No. 80-251

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MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether the exclusion of females from the draft registration provisions of the Military Selective Service Act, 50 U.S.C. App. 451 *et seq.*, invidiously discriminates against males in violation of the Due Process Clause.

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* Other respondents are David Sitman and Owen F. Jones. On July 1, 1980, the district court certified a class, pursuant to Rule 23(b)(2), Fed. R. Civ. P., of all males registered or subject to registration under Presidential Proclamation No. 4771 and the Military Selective Service Act, or liable for training and service in the armed forces of the United States under the Act.

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OPINION BELOW

The opinion of the district court (App. A, *infra*) is unreported.

JURISDICTION

A three-judge district court was convened to hear plaintiffs' challenge to the constitutionality of the Military Selective Service Act, 50 U.S.C. App. 451, *et seq.* in July 1974, pursuant to 28 U.S.C. (1970 ed.) 2282. The order of the district court (App. B, *infra*), which held unconstitutional and enjoined the enforcement of the registration provisions of the Act, was entered on July 18, 1980. A notice of appeal to this Court (App. C, *infra*) was filed on July 18, 1980. Jurisdiction is conferred by both 28 U.S.C. 1252 and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The relevant provisions of the Military Selective Service Act, 50 U.S.C. App. 453 and 454(a), are set forth in App. E, *infra*.

STATEMENT

1. This case involves the constitutionality of the statutory provisions governing draft registration and, consequently, under present law, the continuing

authority of the President and the Congress to mobilize armed forces through conscription.

In the Military Selective Service Act Congress has established procedures for maintaining "adequate armed strength * * * to insure the security of [the] Nation" [1] and for responding to national emergencies. The Act provides separately for registration and for conscription (and attendant classification), but no conscription can take place without prior registration. Thus, Section 453 empowers the President to require by proclamation the registration of "every male citizen" and male resident alien "between the ages of eighteen and twenty-six," and Section 454 renders individuals "required to register * * * liable for training and service in the Armed Forces" upon appropriate call-up. Although conscription has not presently been sought by the President or authorized by Congress,[2] the President on July 2, 1980 signed Proclamation No. 4771 reinstating registration procedures and calling for the registration of young men aged 19 and 20 during the two week period commencing July 21, 1980. Presidential Proclamation No. 4771, *reprinted in* 45 Fed. Reg. 45247 (1980). Congress approved funding for registration on June 12, 1980 in H.R.J. Res. 521, which was signed into law on June 27, 1980.

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[1] 50 U.S.C. App. 451(b).

[2] The Act was amended in 1973 generally to preclude conscription. Pub. L. No. 92-129, 85 Stat. 353, 50 U.S.C. App. 467(c). Selective Service registration procedures were discontinued by President Ford in 1975. *Presidential Proclamation* No. 4360, 11 Weekly Comp. of Pres. Doc. 318 (1975). Reactivation of the conscription process would thus require an amendment of the Act.

In part, the decision to revitalize the registration process was a response to the invasion of Afghanistan, which marked the "first time in over 30 years that the Soviet Union introduced its own forces into the territory of a neighboring nonaligned country." Affidavit of Dr. John White ¶ 2 (attached to appellant's stay application). As the President's delegates advised the Senate Armed Services Committee, Subcommittee on Manpower and Personnel on April 2, 1980:

> When the issue of peacetime registration was raised last September * * * the Director of OMB said that registration * * * was not necessary *at that time.* There was no crisis that had the potential for an imminent threat to the vital interests of the United States. The situation is different now, and so is our position on the issue of peacetime registration. The Administration's position before this crisis in Southwestern Asia was that *the President would not hesitate to use his present authority to require registration at any time he sees it as a necessary step to preserving or enhancing our national security interests.* He is convinced that time has come. [Emphasis in original.]

Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services, 96th Cong., 2d Sess. 1801, 1805 (1980) (Joint Statement of Dr. John P. White, Deputy Director, Office of Management and Budget, Bernard Rostker, Director of Selective Service and Richard Danzig, Principal Deputy Assistant Secretary of Defence). On the basis of the largely equitable considerations, the President also recommended that Congress amend the Military Selective Service Act to permit the registration and conscription of women. *Presidential Recommenda-*

tions for Selective Service Reform; A Report to Congress Prepared Pursuant to Pub. L. No. 96-107 at 27 (Feb. 11, 1980) (R. 196).[3]

Congress agreed that reinstitution of registration was "vitally necessary" and appropriated funds for that purpose on June 12, 1980 through H.R.J. Res. 521.[4] S. Rep. No. 96-826, 96th Cong., 2d Sess. 157 (1980) (R. 874). It declined however, to extend registration to women at this time.[5] This judgment was based on the Senate Armed Services Committee's "assessment of the military needs of the nation and its comprehensive study of the registration issue." *Ibid.*

Besides considering the societal impact of registering women, the Subcommitte on Manpower and Personnel attributed "universal support[ ] by military leaders" to the present law and policy restricting women from routinely engaging in combat and close support roles. *Ibid.* The Subcommittee observed that

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[3] "R." refers to the Joint Documentary and Stipulated Record. The President also acknowledged, however, that the "number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as close combat roles, for men only and (3) the need to reserve a substantial number of noncombat positions for men in order to provide a pool of ready placements for close combat positions." *Presidential Recommendations*, R. 224.

[4] During earlier Senate hearings on the reinstitution of procedures for registration under the Act, serious concern had been expressed about the nation's inability to mobilize military forces on short notice in the event of an emergency. *Reinstitution of Procedures for Registration under the Military Service Act: Hearings on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 1 (statement of Senator Nunn), 3-4 (statement of Senator Morgan) (1979).

[5] This action was taken in committee by voice vote.

the military needs primarily met through conscription—military occupation specialities for which "mobilization manpower power is * * * severely short" and which "are most difficult to recruit for during peacetime"—are foreclosed to women as a result of the combat restrictions on the deployment of women service members. S. Rep. No. 96-826, 96th Cong., 2d Sess. 158 (1980).[6]

2. The instant suit, challenging the Military Selective Service Act on several constitutional grounds, was filed in 1971 by male citizens subject to registration and induction.[7] In 1974 a three-judge district court was convened pursuant to 28 U.S.C. (1970 ed.) 2282 to consider only whether the Military Selective Service Act impermissibly discriminates on the basis of gender in limiting registration to males. After sev-

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[6] The Subcommittee also stressed the "important contribution[s]" made by women to our armed forces, but noted that women had been volunteering in dramatically increasing numbers "in the past few years" and that this trend is expected to continue. S. Rep. No. 96-826, *supra*, at 157.

[7] At that time, plaintiffs alleged that the Act amounted to a taking of property without due process, required involuntary servitude, violated their rights to free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated between males and females. See February 19, 1980 Order at 1-2 (Attachment G to stay application). An initial application to convene a three-judge court was denied in April 1972 and the suit was dismissed. On appeal, the Third Circuit rejected as insubstantial all but the last of plaintiffs' claims. The court of appeals remanded for a determination whether that claim was substantial enough to require convening a three-judge court, and whether plaintiffs had standing to press their equal protection claim. *Rowland* v. *Tarr*, 480 F.2d 545 (3d Cir. 1973). On remand, the district court answered both inquiries in the affirmative and a three-judge court was convened. February 19, 1980 Order at 3.

eral years of dormancy,[8] the case was scheduled in 1980 for trial, and the district court certified the present plaintiffs—who include at least one individual subject to the July 21, 1980 registration—as representatives of a nationwide class of potential registrants and conscripts. See App. B, *infra*, 2a-4a. A hearing was held on July 1, 1980.

By opinion of July 18, 1980 (App. A, *infra*, 14a), the district court held essentially that the rational basis test of *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), no longer obtains, but that the male-only draft rather must be shown to be "substantially related to an important governmental objective" under the standard articulated in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). See also *Wengler* v. *Druggists Mutual Insurance Co.*, No. 79-381 (Apr. 22, 1980). Applying the latter test, the court weighed and reassessed the congressional evidence on the mobilization flexibility provided by an all-male registration and draft, and determined independently that Congress' judgment was wrong (App. A, *infra*, 37a-43a). The court based this conclusion in large part on evidence presented by the Executive Branch in favor of an expanded registration, and the court's own views as to how women conscripts might be deployed (*id.* at 41a-43a). The court then declared the

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[8] On July 1, 1974, the court, with Judge Rosenn dissenting, rejected defendants' threshold challenges to the court's jurisdiction and to the justiciability of the case. No further proceedings occurred until June 1979 when the court proposed to dismiss the case pursuant to Local Court Rule 23(a), of the District Court for the Eastern District of Pennsylvania. There was then additional discovery and, on February 19, 1980, the court denied defendants' motion to dismiss on standing, mootness and ripeness grounds because of the existence of material factual questions on these issues.

registration provisions unconstitutional, and enjoined the government from requiring registration (App. B, *infra*, 44a-45a).

On the same day, the district court denied a request for a stay pending appeal and we applied for a stay from this Court. On July 19, 1980, Mr. Justice Brennan stayed the execution and enforcement of the district court's judgment (App. D, *infra*, 47a-53a).

THE QUESTION IS SUBSTANTIAL

The district court has ordered Congress to expand registration to include women, or to forego entirely the option of a military draft. This ruling upsets decades of judicially approved historical defense practice, and assumes an unaccustomed role for the judiciary in matters which have always been committed to the broad discretion of the coordinate branches of government. Moreover, the district court's holding that the gender-based distinction drawn by the Act must be scrutinized under the intermediate test of *Craig* v. *Boren*, and the approach the district court took in applying that formula, implicate broad questions in the area of equal protection analysis generally. As Mr. Justice Brennan recognized, this case presents constitutional issues whose "importance * * * and substantiality are beyond cavil," and draws into question the validity of "an important statutory scheme" that "the Government should not be obliged to abandon * * * without an opportunity for plenary consideration by [this] Court." App. D, *infra*, 50a-51a n.3.

1. The district court erred in examining the Act's gender-based distinction under the stricter test set forth in *Craig* v. *Boren*, 429 U.S. 190 (1976), rather than applying the rational relationship test this Court invoked in *Schlesinger* v. *Ballard*, 419 U.S. 498

(1975), for reviewing statutory classifications geared to national defense needs.

Much like the present case, *Schlesinger* v. *Ballard* involved gender-based discrimination in the military sphere. Under the statutory provisions there involved, commissioned male naval officers were subject to mandatory discharge for failing twice to be promoted within approximately 10 years, whereas women officers were afforded 13 years to obtain equivalent promotions. Although it previously had subjected gender-based discrimination to heightened scrutiny in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court in *Schlesinger* v. *Ballard* looked only to whether the disparate treatment of male and female officers was rational. 419 U.S. at 508. In so doing, the Court recognized that Congress has "especially broad constitutional power" to raise armies under Art. 1, § 8, and emphasized that the "responsibility for determining how best our Armed Forces shall attend to" fighting and preparing to fight wars rests with Congres , and not with the courts. 419 U.S. at 510. See also *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955).

By adopting a more exacting standard of review, the district court put itself in the inevitable position of directing how our armed forces shall attend to the business of national defense. Although it disavowed this intention (App. A, *infra*, 22a), the district court sifted and reweighed the evidence before the Senate Armed Services Committee in favor of an all male registration and draft, and concluded de novo that it was "unconvincing." *Id.* at 23a. Relying on selective studies, the district court expressed its own view on "height and weight" advantages that

might be derived from the use of women soldiers; assessed the "concentration of skills" that women and men would supply as a predicate to offering who might be deployed into combat; and went so far as to discount congressional evidence concerning the need to use conscripts in combat roles on the assumption that "[t]his is probably less likely in this time of high technology warfare." [9] *Id.* at 28a n.18; 33a-34a; 32a n.23. Clearly, the district court entered a realm beyond its "technical competence." *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 8.[10] See *Bertelsen* v. *Cooney*,

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[9] The district court implictly justified its independent factual conclusions on the ground that the Executive Branch has itself sought to expand registration to include women, and has presented evidence to Congress in support of that end. In the final analysis, however, the Constitution commits this choice, and its timing, to Congress. It is noteworthy that at the time *Schlesinger* v. *Ballard* was decided, the Department of Defense had submitted a bill to Congress that would have eliminated the preferential treatment of women that was under attack before the Court. In upholding the classification under a rational basis approach, even in view of this factor, the Court stated: "These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the [military] policy goals sought to be served by [the statute] are no longer necessary." 419 U.S. at 510 n.13.

[10] We recognize that the Court in *Craig* v. *Boren*, *supra*, 429 U.S. at 198, stated that the gender-based discrimination that was at issue in *Frontiero* v. *Richardson* failed constitutional scrutiny because it did not advance an "important [governmental] objective," and that *Frontiero* involved a classification in a military statute. However, the statutory classification at issue in *Frontiero* was not related to military preparedness. Rather, it raised only questions involving financial compensation, and was thus directly analogous to *Califano* v. *Webster*, 430 U.S. 313 (1977), and similar cases involving the disparate award to male and female wage earn-

213 F.2d 275, 277 (5th Cir.), cert. denied, 348 U.S. 856 (1954) ("It is not for the judiciary to review the legislative branch on question of what military strength is necessary for safety of the Nation, nor as to how the forces shall be raised, nor of what elements they shall be composed"). Cf. *Vance* v. *Bradley*, 440 U.S. 93, 97, 111-112 (1979).

The district court dismissed the application of a deferential standard of review as only "superficially appealing," and concluded that "the test to apply" in reviewing gender-based distinctions may "not vary from one factual context to another" (App. A, *infra*, 19a, 30a). But that approach ignores *Schlesinger* v. *Ballard*, a decision of continuing vitality. Moreover, the application of a rational basis standard in *Schlesinger* v. *Ballard* is wholly consistent with the similar rule the Court has followed in First Amendment cases arising in defense contexts. For example, in *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court applied a deferential standard of review and upheld the government's ban of political speech on military bases—a content-based restriction of a fundamental First Amendment right that would have been flatly impermissible in a civilian context. See concurring opinion of Mr. Justice Powell, 424 U.S. at 842, 845. Similarly, in *Brown* v. *Glines*, No. 78-1006 (Jan. 21, 1980), the Court upheld Air Force regulations imposing a prior restraint on the First Amendment right to petition that were intended to ensure mili-

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ers of social welfare benefits. See *Wengler* v. *Druggists Mutual Insurance Co., supra.* Gender-based distinctions in the realm of draft registration, on the other hand, are based are central to the defense mission of the armed services. See *United States* v. *Macintosh*, 283 U.S. 605, 622 (1931).

tary discipline and morale, without requiring the government to demonstrate the "compelling interest" that would have to be advanced to support a prior restraint in a civilian context. See also *Snepp* v. *United States*, Nos. 78-1871 and 79-265 (Feb. 19, 1980), slip op. 3 n.3 (condoning prior restrictions on publication in the interest of national security "that in other contexts might be protected by the First Amendment"); *United States* v. *Macintosh*, *supra*, 283 U.S. at 622 (breadth of war powers permits Congress to take a wide variety of actions that would be constitutionally prohibited in non-defense contexts).

A deferential standard of review is also appropriate here because the composition of the draft pool has been the continuing subject of a vigorous congressional debate. "[W]hen an issue involves policy choices as sensitive as [these], * * * the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe*, 432 U.S. 464, 479 (1977). The compulsory inclusion of women in a draft registration has also been a focal point of the pending Equal Rights Amendment. See *e.g.*, S. Rep. No. 92-689, 92d Cong., 2d Sess. 13-14 (1972); *Equal Rights for Men and Women 1971: Hearings on H.R. Res. 35, 208 and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

Since, as we demonstrate below, the all-male registration provision is in all events substantially related to an important governmental interest, it plainly survives scrutiny under the rational basis test. Indeed, the provisions stricken by the court below have been upheld repeatedly in the face of similar Equal Protection challenges on this basis. See, *e.g.*, *United States* v. *Reiser*, 532 F.2d 673 (9th Cir.), cert.

denied, 429 U.S. 838 (1976); *United States* v. *Baechler*, 509 F.2d 13 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); *United States* v. *Camara*, 451 F.2d 1122 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); *United States* v. *Fallon*, 407 F.2d 621 (7th Cir.), cert. denied, 395 U.S. 908 (1969).

2. The registration provisions—which are a mechanism for implementing induction—are constitutional even if the Act is judged under the stricter standards applicable to analysis of gender-based discrimination in non-defense contexts.

Conscription serves generally to supplement the volunteer forces with the additional personnel Congress considers necessary to defend the nation, respond to emergency or deter aggression. The dominant objective of the Act is to raise an army to meet these needs "speedily and efficiently." *Falbo* v. *United States*, 320 U.S. 549, 553 (1944). The entire system is, by definition, combat oriented, and plaintiffs have not challenged the validity of current law and policy [11] precluding women from combat and combat-support roles. See App. A, *infra*, 22a.

It is fundamental that Congress may structure the registration and draft to satisfy its perception of miltary needs, *i.e.* to determine "who shall serve * * * and in what way." *United States* v. *Macintosh*, *supra*, 283 U.S. at 622. In recently reviewing these needs, Congress concluded that the positions in which there are critical shortages, and which would

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[11] See 10 U.S.C. 6015 (exclusion of women from vessels expected to be assigned to combat); 10 U.S.C. 8549 (exclusion of women from assignment to duty in aircraft engaged in combat mission); S. Rep. No. 96-826, *supra* at 157 (Congress ratified army policy that "women should not intentionally and routinely engage in combat * * *").

have to be filled by conscription, are largely foreclosed to women. As explained in S.Rep. No. 96-826, *supra*, at 157-158:

> It is in these skills [*i.e.*, infantry specialists, armor specialists, combat engineers, and positions in field artillery and air defense], and more specifically in the very large number of positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. The Personnel Chiefs of the Army and Marine Corps, for example, testified that it is in these combat skills where the All-Volunteer Force has failed to supply sufficient recruits, and where current strengths of combat units is often woefully inadequate. In peacetime, although only 6 percent of Army enlisted skills are closed to women, fully 42 percent of all billets [assignments] filled by enlisted personnel in the Army are in specialities, skills or units not available to women. These include non-combat positions in close support units that could come under enemy fire.

Accord S.Rep. No. 96-226, 96th Cong., 1st Sess. 3 (1979).

On the other hand, evidence has been tendered—and found convincing by Congress—that non-combat military needs that can presently be satisfied by women are already met by women volunteers, whose numbers have been steadily increasing. See, *e.g.*, S. Rep. No. 96-226, *supra*, at 8-9; *Reinstitution of Procedures for Registration under the Military Selective Service Act: Hearings on S.109 and S.226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st

Sess. 14 (testimony of General Rogers, Chief of Staff, U.S. Army); 14-15 (testimony of General Allen, Chief of Staff, U.S. Air Force); 15 (testimony of Admiral Hayward, Chief of Naval Operations) (testimony of General Wilson, Commandant, U.S. Marine Corps (1979). And, of course, the exclusion of women from compulsory registration does not impede women voluntarily from pursuing military roles for which they are otherwise legally eligible. Rather than prohibiting women from participating in the military on the basis of outmoded stereotypes, the all-male registration provision responds to the congressional perception of potential emergency mobilization needs. That perception is legitimately grounded on Congress' recognition that males and females are not "similarly situated" in view of combat restrictions that apply only to women. Cf. *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508.

Congress was moreover of the view that all potential conscripts—whether or not destined for combat assignments—should be combat-capable so as to permit the armed forces the most flexible use of a finite number of personnel. "In peace and war, significant rotation of personnel is necessary." S. Rep. No. 96-826, *supra*, at 158. History has demonstrated a military need to be able to rotate combat and non-combat troops in exigent circumstances. This point was illustrated by General Tice, Deputy Assistant Secretary of Defense and former European Division Commander:

> During the Battle of the Bulge in 1944, whether you were already in or about to be drafted, everyone immediately went into combat, because it was critical we turn out all combat individuals. We even retrained the clerks and cooks in France and sent them to the front line [R. 1636].

Accord, *Reinstitution of Procedures for Registration under the Military Service Act: Hearings on S.109 and S.226, supra*, at 16 (testimony of Army Chief of Staff Rogers). Significantly, every male conscript, regardless of assignment, is combat trained and ready. Although the need for combat-capable conscripts is most easily perceptible in the context of actual war, it is equally relevant in structuring a pre-mobilization roster for purposes of achieving preparedness for war. To replace combat-capable males with combat-barred females denies the military the flexibility it obtains through an all-male draft and conscription.[12]

Because the all-male registration bears a substantial relationship to the Act's crucial purpose of "mobilizing national manpower in the shortest practicable period" with maximum effectiveness, *Falbo* v. *United States, supra*, 320 U.S. at 554, it passes constitutional muster under the intermediate test of *Craig* v. *Boren*. The district court's contrary conclusion results from its independent reassessment of the

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[12] Congress also was secondarily concerned with the fact that only a finite number of individuals can be processed and subjected to training under the Military Selective Service Act at a given time. In the event of a mobilization, having to meet military needs under these circumstances while drawing from separate male and female registration pools "would create monumental strains on the training system, would clog the personnel administration and support systems needlessly, and would impede our defense preparations at a time of great national need." S. Rep. No. 96-826, *supra*, at 159. Although contending with problems of this sort might be regarded as a matter of administrative convenience in another context, that label is misleading where the establishment of a system of preparedness that permits mobilization with maximum effectiveness and "in the shortest practicable period" is the central purpose of the Act. *Falbo* v. *United States, supra*, 320 U.S. at 554.

evidence that was Congress' to judge, cf. *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979), and from the flawed presumption that an exclusionary registration is unacceptable where Congress is capable of tailoring registration and induction efforts into combat and non-combat pools, and thus achieving emergency preparedness in a constitutionally less obtrusive manner. But this latter approach demands far too much of the "substantial relationship" test of *Craig* v. *Boren*, and is rather based upon the stricter standards applicable only with respect to statutory distinctions implicating fundamental rights or suspect classifications. See *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).[13]

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[13] Although threshold challenges have been raised below, we believe this case is justiciable. The Military Selective Service Act imposes the requirement that "no judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction. * * *." 50 U.S.C. App. 460(b)(3). But the Court has declined to construe this provision literally, *Oestereich* v. *Selective Service System Local No. 11*, 393 U.S. 233 (1968), and has held that preinduction review may lie where the issue presented is not fact bound and where granting review would not "promote the 'litigious interruptions of procedures to provide necessary military manpower' that Congress intended to prevent," *Fein* v. *Selective Service System*, 405 U.S. 365, 376 (1972). Under this test, jurisdiction lies. Indeed, because a ruling on the constitutional issue adverse to the government could deprive the country of its mobilization capacity until such time as the Act were amended, the deferral of a decision until inductions were actually required could be far more disruptive than deciding the case now. Insofar as plaintiffs' standing to sue is concerned, we are persuaded

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1980

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that the Act's requirement that men alone bear the burden of registration confers injury in fact upon those in the age group covered by Presidential Proclamation No. 4771. See *Orr* v. *Orr*, 440 U.S. 268, 271-277 (1979).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG

v.

BERNARD ROSTKER, ET AL.

MEMORANDUM

CAHN, J. July 18, 1980

I. PRELIMINARY STATEMENT

Before this three-judge court is the issue of the constitutionality of the selective service registration of males only, as provided for in the Military Selective Service Act, 50 U.S.C. App. § 451 *et seq.* (hereafter MSSA). In preliminary proceedings we set forth the history of this case, *Goldberg* v. *Tarr*, No. 71-1480 (E.D. Pa. Feb. 19, 1980).[1] We will not repeat it here. In that opinion we identified plaintiffs' constitutional argument as follows:

> [T]heir rights to equal protection of the law, as that concept is included in the due process clause of the Fifth Amendment, are violated in that males only are subject to registration for the draft, and therefore there is an increased prob-

[1] Curtis Tarr was the Director of the Selective Service System at the time this suit was filed. Bernard Rostker, the new Director, was substituted for Mr. Tarr as a defendant by stipulation of the parties filed July 15, 1980.

> ability of the male plaintiffs actually being inducted because the pool of draft eligibles is decreased by the exclusion of females.

Goldberg v. *Tarr*, *supra*, slip op. at 7. Plaintiffs aliege that they are harmed as a result of a gender classification that cannot be justified under applicable standards of constitutional review.

Subsequent to our opinion, *Goldberg* v. *Tarr*, *supra*, we granted the unopposed motion of Owen F. Jones to intervene as a party-plaintiff in this action.[2]

The parties have submitted a five volume Joint Documentary and Stipulated Record and filed extensive briefs.[3] On July 1, 1980, at oral argument, we granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23(b)(2).[4] The class has been de-

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[2] Owen F. Jones is a 19 year old male citizen of the United States, residing within the Eastern District of Pennsylvania, and is under compulsion of law to register with the Selective Service System between July 21 and August 4 of 1980.

[3] Although our Order of February 19, 1980, contemplated a hearing to develop a factual record, the parties were able to rest on the basis of their Joint Documentary and Stipulated Record. The Government Printing Office produced an illegible pagination of the Documentary and Stipulated Record, Volume I through IV. Therefore, we will cite to the page of the actual document included in that record, without citation to the record pages. We will order counsel for defendants to repaginate the record and submit it to us with the record page citations for all citations to documents in the record contained in this opinion where the record page has not been cited because of illegibility.

[4] Also, at oral argument several oral motions to join were made and denied. Formal written motions were subsequently filed. The movants were as follows. Movant Stephen Retherford is a male citizen of the United States, born September 24, 1951, who resides in Richmond, Virginia. In 1969 Mr. Retherford was required to and did register with the Selective Service System. He was given a student deferment until

fined to include all male persons who are registered or subject to registration under 50 U.S.C. App. § 453

1971 when he was reclassified 1-H. Movant Bruce Josephs is a male citizen of the United States, born November 30, 1956, who resides within the Eastern District of Pennsylvania. Mr. Josephs registered with the Selective Service System in 1975, and was given a student deferment, 2-S classification, which he still holds. Both Mr. Retherford and Mr. Josephs allege they remain liable for involuntary service and training under 50 U.S.C. App. § 467. Movant Ross Hunter is a male citizen of the United States, born September 15, 1961, residing within the Eastern District of Pennsylvania. Mr. Hunter is under compulsion of law to register with the Selective Service System between July 21 and August 4, 1980.

We also denied the then pending written motions of Carter Faust and Steven Goldberg to intervene as party-plaintiffs. Faust and Goldberg are male United States citizens residing in the Eastern District of Pennsylvania. They were born in 1961 and 1960, respectively. The apparent purpose for their motion to intervene was to permit their counsel, The American Civil Liberties Union (ACLU), to enter the case. The ACLU had already participated in preparing the briefs and in compiling Volume V of the Joint Documentary and Stipulated Record.

Finally, we denied the written motion of Robert J. LaRocca to join as a party-plaintiff. Robert J. LaRocca, is a male citizen of the United States, born August 8, 1946, who resides within the Eastern District of Pennsylvania. Mr. LaRocca registered with the Selective Service System in 1966. At that time he received a deferment as a student (2-S classification) and in 1974 received a deferment as a teacher (2-A classification). Mr. LaRocca is now an attorney associated with the firm representing plaintiffs, Kohn, Savett, Marion and Graf, in Philadelphia. The grounds for Mr. LaRocca's deferments no longer exist and Mr. LaRocca is subject to conscription and training under the MSSA until he reaches the age of thirty-five in 1981.

We denied these motions because movants are members of the class.

or are liable for training and service in the armed forces of the United States under 50 U.S.C. App. §§ 454, 456(h) and 467(c).

The following legislative and executive actions have occurred after the filing of defendants' motion for summary judgment which was the subject of our opinion in *Goldberg* v. *Tarr, supra.*[5] The President and representatives of the military services and the Selective Service System recommended reinstatement of selective service registration, with an amendment of the MSSA to allow the inclusion of females in that registration.[6] The recommendation to amend the

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[5] In our opinion we stated that:

> There are four bases for defendants' summary judgment motion. Defendants contend the matter is moot, the plaintiffs lack standing, the plaintiffs seek an advisory opinion and the issue of a male-only draft is a nonjusticiable political question.

Goldberg v. Tarr, *supra*, Slip. Op. at 5. In that opinion, we dismissed the fourth basis for defendants' motion—that the issue before us is a nonjusticiable political question—because the Court of Appeals for the Third Circuit had previously rejected that contention. Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973). We also determined that we needed an amplification of the record before we could decide the remaining contentions. Therefore, the motion for summary judgment was denied.

[6] Presidential Recommendation for Selective Service Reform: A Report to Congress Pursuant to P.L. 96-107 (February 11, 1980), Record at 196; Testimony of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Military Personnel of the House Armed Services Committee (March 5, 1980), Record at 958; Testimony of Richard Danzig, Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Com-

MSSA to eliminate the exclusion of females was defeated. However, the House and Senate passed Joint Resolution 521 on June 12, 1980, which allocated $13,285,000 for salaries and expenses of the Selective Service System for the fiscal year ending September 30, 1980. This appropriation was to allow renewal of all-male selective service registration. On June 16, 1980, the Selective Service System promulgated new regulations setting forth revised procedures for registration. 45 Fed. Reg. 40577 (June 16, 1980). Joint Resolution 521 was signed by President Carter on June 28, 1980. On July 2, 1980, President Carter issued Presidential Proclamation No. 4771, providing for the commencement of selective service registration on July 21, 1980. 45 Fed. Reg. 45247 (July 2, 1980). Under the Proclamation and regulations, males born in 1960 must register during the week of July 21, 1980, at a United States Post Office. During the following week all males born in 1961 must register. There are approximately four million male citizens who were born in 1960 and 1961. No further registrations have been ordered at this time.

II. JURISDICTION

Defendants argue that this court has no jurisdiction to adjudicate the claims of the plantiffs because plaintiffs lack standing and the case is not ripe for review. We now consider these contentions.[7]

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mittee (March 19, 1980), Record at 812, *et seq.*; Testimony of Bernard D. Rostker, Director of the Selective Service System, before Subcommittees of the Senate and House Armed Services Committees (March 5 and 19, 1980), Record at 841 and 974.

[7] The litigants agree that mootness is no longer an issue given the congressional and executive actions detailed above and the intervention of Owen F. Jones.

A. STANDING

To establish standing to bring this action plaintiffs must demonstrate that they face a distinct and palpable injury with a fairly traceable causal connection to the challenged conduct. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978). In *Duke Power* the plaintiffs were a group of residents of areas near two nuclear power plants which were under construction. Plaintiffs challenged the constitutionality of a federal statute which limited the aggregate liability of the plant operators to $560 million per nuclear "incident." The Court considered the potential effect of the operation of the two plants to be built, and determined that the threat of prospective environmental and thermal pollution to two lakes in the vicinity was sufficient to meet the "injury in fact" requirement of the standing test. Evidence that the plants would not have been built without the limitation on liability supplied the "causal connection." The Court held that it was not necessary for pollution to enter the environment before the plaintiff had standing.

Similarly, the Court has held that plaintiffs had standing in cases where the alleged injury was even more attenuated than that in *Duke Power*. *See United States* v. *SCRAP*, 412 U.S. 669 (1973) (law students had standing to oppose regulations which could result in increased litter in parks which they used). *See also Americans United for the Separation of Church and State, Inc.* v. *H.E.W.*, No. 79-1221 (3d Cir. April 17, 1980).

In the instant case the harm to the plaintiffs is neither remote nor hypothetical. Those members of the class born in 1960 and 1961 are under compulsion of law to present themselves for registration

with the Selective Service System (Selective Service) between July 21, 1980, and August 4, 1980. Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (July 2, 1980). The MSSA provides:

> [A]ny person who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

50 U.S.C. App. § 462.

Thereafter these registrants are under a continuing obligation to inform Selective Service of any changes of address, and to maintain proof of registration. 45 Fed. Reg. 49,577 (June 16, 1980); 32 C.F.R. § 1641. In addition, the statute requires that:

> [E]ach registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces.

50 U.S.C. App. § 454(g). Those members of the plaintiff class who registered before April 1, 1975, are under a current legal obligation to maintain their registration and report their changes of residence to

the Selective Service.[8] Those plaintiffs already registered are subject to potential reclassification and induction into the armed services.

In this factual context it is clear that the class has standing to raise the issue before us. However, in analyzing these issues it becomes evident that the class contains three subclasses of individuals, one of which does not have standing.

> 1. Those individuals registered with the Selective Service System before Presidential Proclamation No. 4360 terminated registration on April 1, 1975, and who remain liable for involuntary training and service.
>
> 2. Those individuals required to register with the Selective Service System between July 21, 1980, and August 4, 1980.
>
> 3. Those individuals who have never been registered with the Selective Service System and are not under any compulsion to register in the near future.

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[8] Proclamation No. 4360 issued by President Ford terminated registration on April 1, 1975. 40 Fed. Reg. 14567 (April 1, 1975). Those registered before 1975 were given a Registration Certificate and Notice of Classification. We take judicial notice of the Registration Certificate which states:

> The law requires you to have this Registration Certificate in your personal possession until your liability for service and training is terminated or to surrender it upon entering active duty in the Armed Forces.

The Notice of Classification states:

> The Military Selective Service Act requires you to have this Notice of Classification in addition to your Registration Certificate in your personal possession until your liability for training and service is terminated or until you turn it in upon entering active duty in the armed forces.

Because we find that registration itself and the continuing obligations placed on registrants under both the old and new selective service regulations are a sufficient intrusion on an individual's rights, the members of the first two subclasses have standing in this case. However, we find no distinct and palpable harm nor imminent threat of concrete harm to the third subclass of individuals sufficient to establish standing in the instant case. Therefore, in the order accompanying this opinion we will redefine the class to exclude this third subclass.

We are convinced that class plaintiffs, as they will now be defined, have "alleged such a personal stake in the outcome of the controversy so as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

The causal connection between the current and imminent aspect of the alleged harm and the allegedly unconstitutional legislation is direct and requires no difficult factual inquiry. The statute attacked is the statute which imposes the burdens on plaintiffs.

B. RIPENESS

The ripeness inquiry involves two steps: first, we must determine if there is a "case or controversy" before the court within the meaning of Article III of the Constitution; second, we must examine prudential reasons for accepting or declining jurisdiction at this time, considering whether " 'we will be in no better position later than we are now' to decide this question." *Duke Power Company* v. *Carolina Environmental Study Group, Inc.*, *supra* at 82, *quoting*

in part, Regional Rail Reorganization Act Cases, 419 U.S. 102, 143-144 (1974).

Addressing the "case or controversy" requirement in *Duke Power* the Court said:

> Our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement.

438 U.S. at 81. Similarly in the instant case our finding that plaintiffs suffer current or imminent harm satisfies the constitutional requirement that plaintiffs present a live case or controversy to the court and that they do not seek an advisory opinion.

Prudential concerns strongly suggest that this case is ripe. Defendants argue that this case will not be ripe until military mobilization and induction of registrants take place. Time cannot appreciably clarify the record before us. Delay until a period of national emergency occurs would require us to decide sensitive constitutional issues in an atmosphere of urgency which might intrude upon a well-considered adjudication. Also, were we to wait until actual mobilization, Congress may well find itself faced with the necessity of revising and reshaping legislation of monumental importance in an atmosphere totally unconducive to measured thought.[9]

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[9] Bernard D. Rostker, Director of the Selective Service System, testified that it would be disruptive to have a court intervene in a post-mobilization environment. Deposition of Rostker, at 43 (May 13, 1980). The Department of Defense itself was concerned over the problems that might arise were this issue litigated in a time of emergency mobilization. Deposition of Richard Danzig, Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics at

Defendants' argument on both standing and ripeness can be reduced to their assertion that registration alone is so inconsequential and so minor a requirement that we should not adjudicate this case at this time. Free people abhor any governmental intrusion into privacy and such intrusions are tolerated only as justified by the needs of society. We will accept no argument that intrusions are inconsequential and beneath the recognition of a federal court. The concept that the government can, without justification, require any group of Americans to register and continually report their whereabouts is constitutionally unacceptable. The reasons for any intrusions by the government must always be open to scrutiny under the Constitution. The justification for registration in the instant case is the need to conscript armed forces in an orderly manner to meet the defense needs of the nation. This purpose is clearly valid. However, the need to register men only, and the need not to register women, is not so apparent.

Registration is a sufficient intrusion on the rights of any citizen to allow this court to adjudicate the constitutionality of that registration. We need not wait, and should not wait, until the governmental intrusion on the individual's civil rights reaches maximum proportions and the nation is in a time of crisis.[10] The case is ripe.

9-10. Even Senator Nunn, steadfastly opposed to the registration of women, wanted no legal challenge in wartime. *See* Statements of Wellford, Rostker and Danzig before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 18-19. (March 19, 1980).

[10] Defendants argued that the case would not be ripe until July 21, 1980, when the first registration is to begin. It

III. THE CONSTITUTIONALITY OF AN EXCLUSIVELY MALE REGISTRATION FOR SELECTIVE SERVICE

A. The Standard of Review to Determine if Gender-Based Discrimination is Unconstitutional

The defendants concede that selective service registration of males only constitutes discrimination based on gender and that "defendants thus have the burden of justifying that classification." Defendants' Reply Brief on Burden of Proof, at 3. The litigants part company, however, on exactly what test or standard this court should apply in making the determination of whether or not the defendants have met the burden of justifying the exclusion of females from registering for selective service.

The opinions of the Supreme Court have established three standards of review which may be applied in analyzing discriminatory classifications under the Equal Protection clause and the Fifth Amendment to the United States Constitution. Any statutory discrimination, at a minimum, must bear a reasonable relationship to a permissible governmental purpose (hereinafter the "reasonable relationship" test). *McDonald* v. *Board of Election*, 394 U.S. 802 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949). Ordinarily, statutory classifications based on gender are unconstitutional unless they are sub-

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would be unconscionable to delay our decision until then. Millions of dollars of taxpayers' funds would be wasted if we delayed granting relief until after the registration began. We believe this case ripe for adjudication, and prudence argues forcefully against delay.

stantially related to an important government interest (hereinafter the "important government interest" test). *Wengler* v. *Druggists*, U.S. , 64 L.Ed.2d 107 (1980); *Craig* v. *Boren*, 429 U.S. 190 (1976); *cf. Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (plurality opinion). Racial or religious classifications or other "suspect" classifications will be unconstitutional unless they are necessary to accomplish a compelling state interest (hereinafter the "compelling government interest" test). *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Loving* v. *Virginia*, 388 U.S. 1 (1967).

The plaintiffs first urge that registration may lead to induction into military service and military service necessarily infringes upon fundamental rights. *See, e.g., Greer* v. *Spock*, 424 U.S. 828 (1976). Therefore, they argue, defendants must establish that the discrimination is essential to the accomplishment of a "compelling government interest." Moreover, plaintiffs claim the draft creates an irrebuttable presumption that women are unqualified and that such a presumption should give rise to the highest level of scrutiny. *Stanley* v. *Illinois*, 405 U.S. 645, 654-56 (1972). In the alternative, plaintiffs maintain the defendants are obligated to establish that the gender-based discrimination serves "important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). *See also Wengler* v. *Druggists Mutual Insurance Co.*, —— U.S. ——, 64 L.Ed.2d 107, 116 (1980).

The defendants contend that the "compelling government interest" test is not applicable to gender-based discrimination cases. Although defendants recognize that the "important government interest"

test is generally applied to gender based discrimination, they argue that it should not be applied here. Defendants argue that under *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) the judicial branch should extend great deference to Congress in military affairs. Therefore, they argue, in the context of this litigation the exclusion of females from the registration process is constitutional if defendants establish merely that the exclusion is rationally related to permissible military objectives.

We decide that the appropriate standard to apply is the "important government interest" test.

In *Personnel Administration of Mass.* v. *Feeny*, 442 U.S. 256, 273 (1979), the Court summarized the general standard of review in sex discrimination cases stating:

> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Caban* v. *Mohammed*, 441 U.S. 380, 398 (Stewart, J. dissenting). This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, *Craig* v. *Boren*, 429 U.S. 190, 197, and are in many settings unconstitutional. *Reed* v. *Reed*, 411 U.S. 677; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636; *Craig* v. *Boren*, *supra*; *Califano* v. *Goldfarb*, 430 U.S. 199, *Orr* v. *Orr*, 440 U.S. 268.

"The burden . . . is on those defending the discrimination to make out the claimed justification . . . ," *Wengler* v. *Druggists Medical Ins. Co.*, —— U.S. ——, 64 L.Ed.2d 107, 116 (1980), and the degree to which a "sex centered generalization actually compare[s] with fact" must be substantial. *Craig* v.

Boren, 429 U.S. 190, 199 (1976). This relationship between generalization and actual fact must be shown by empirical evidence. *Id.* at 200-203. Outdated stereotypical notions are not a valid basis for gender discrimination. Administrative convenience is not a valid basis for sex discrimination. *Craig* v. *Boren*, 429 U.S. 190 (1976). As with other gender discrimination cases brought by or on behalf of males, *e.g. Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Craig* v. *Boren*, *supra*; *Wengler* v. *Druggists*, *supra*, the Court has observed that "the statute discriminates against both men and women." *Wengler* v. *Druggists*, *supra*, at 113, and has analyzed the nature of the burden on women. So to, in this case as in *Wengler* we need not inquire whether a statute is intended to benefit or burden women; the same standard applies. *Wengler* v. *Druggists*, —— U.S. ——, 64 L.Ed.2d 107 (1980); *Califano* v. *Webster*, 430 U.S. 313 (1977). The rationale of this rule is that any discrimination stigmatizes women. Gender discrimination is a badge of inferiority and must pass constitutional review whether or not it is arguably for the benefit of women.[11] *See University of California Regents* v. *Bakke*, 438 U.S. 265, 460 (1979) (Opinion of Justices Brennan, White, Marshall and Blackmun). Equal protection involves protection from seemingly well-intended classifications that in fact relegate women to an inferior status. In the instant case it is admitted that a statutory gender classification exists and we are bound to apply these principles as enunciated by the Supreme Court.

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[11] Congress itself declared service in the armed forces under the MSSA to involve both "obligations and privileges." 50 U.S.C. App. § 451(c).

We reject plaintiffs' arguments that the compelling government interest test is appropriate, or that an irrebutable presumption analysis should be applied. It is true that the compelling interest test will be applied where fundamental rights are involved. *See, e.g., Shapiro* v. *Thompson*, 329 U.S. 618 (1969). In *Rowland* v. *Tarr*, 480 F.2d 545 (3d Cir. 1973) (per curiam), the Court of Appeals for the Third Circuit dismissed several of plaintiffs' due process challenges to the draft as precluded by Supreme Court precedent. In other words, the fact that individual rights are infringed in a draft has already been held to be constitutional. The issue remaining in this case is whether the deprivation of rights is applied equally between the sexes. Thus, the key focus is on the difference in the sexes, not the nature of the deprived right.

A simple example makes very clear why strict scrutiny is not applicable here. If a twenty-six year old male brought suit claiming that the fact that twenty-seven year old males are not subject to the MSSA [12] violated his right to equal protection, a "reasonable relationship" test would be applied. There is no reason for heightened scrutiny to protect twenty-six year old males as a group, as exists when the government classifies people by race, religious beliefs, or gender. A strict scrutiny of the classification would not be triggered because induction invades fundamental rights if the classification is unrelated to the fundamental right. That is a due process issue, not one of equal protection of twenty-six year old males and twenty-seven year old males. We would examine the reasons for induction separately from

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[12] Except when they were previously deferred.

the reason for the classification. Induction can be justified as necessary to the compelling government interest in defending the nation. The classification would only have to be justified by administrative convenience. In the instant case, there is no rationale to apply a higher level of scrutiny than is normally applied to gender based classifications.

Plaintiffs' second argument is that the MSSA creates an "irrebutable presumption." If the posture of this case were similar to irrebutable presumption cases, women would be challenging the irrebutable presumption that they are not qualified for registration and induction. In fact, men are challenging what they claim is an irrebutable presumption that only men are qualified (and therefore subject to the burdens of induction). Unlike the traditional irrebutable presumption cases, there is no way a male can rebut this presumption through his own conduct or history, *cf. Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1975). Thus the approach of cases—that the state may use the presumption so long as it is rebuttable—has no application here. For example, in *LaFleur*, the Court held that a public school teacher must be allowed to show she is fit to continue teaching past the fourth month of her pregnancy. In *Vlandis*, as well as other cases, the person protesting the irrebuttable presumption was the one deprived of the benefit. Similarly, in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), an unwed father challenged a presumption that all unwed fathers are unqualified to raise their out-of-wedlock children. These irrebuttable presumption cases are merely recast due process cases where a party is asserting that the presumption deprives him

of a constitutional right. Thus, the heightened level of scrutiny applies where the presumption operates against a party to deprive that party of a fundamental right. In sum, applying an irrebutable presumption analysis to a challenge by men to the male-only registration obfuscates more than it clarifies.

We reject defendants' suggestion that because of deference to Congress in military matters the judicial branch should apply the least stringent "rational basis" test to gender discrimination. The government argues that *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), creates an exception to the "important government interest" test in cases involving the military and that therefore a "rational relation" test applies. In *Ballard*, a male naval officer with more than nine years of active service who failed to secure a promotion and under Navy regulations was subject to mandatory discharge, brought suit claiming that allowing women thirteen years in grade before a mandatory discharge violated his equal protection rights. The Court analyzed the scheme and stated that administrative convenience would not be sufficient to justify the disparate treatment. *Id.* at 506-07. But the Court concluded that the distinction was justified because "male and female . . . officers . . . are *not* similarly situated with respect to opportunities for professional service." *Id.* at 508.

According to the defendants, the *Ballard* Court applied the "rational basis" test in deciding that the male naval officers were not subjected to unconstitutional gender-based discrimination, and that deference to Congress in military matters was the reason for the application of that standard. We disagree with defendants for several reasons. First, the case explicitly says that administrative convenience would not justify the discrimination. In the "rational rela-

tion" line of cases administrative convenience is sufficient to justify discrimination. Second, the Court never articulates the standard it applied. Third, the classes in *Ballard* were *not* similarly situated so the Court was not confronted with deciding the appropriate standard where the classes *are* similarly situated. Finally, a year later in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), the Court said a gender classification will be upheld only if it serves an important governmental objective and is substantially related to achievement of that objective. *Craig* v. *Boren* has been consistently followed to date. The government fails to cite any other cases where the "rational relation" test is held to be appropriate in reviewing gender based classifications.

Finally the test to apply in determining if gender-based discrimination is constitutional should not vary from one factual context to another. The standard is a constant. If any judicial deference is due the Congress it should be extended in the determination of whether the standard is met, not in the definition of what the standard is. It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible constitutional violations committed by the Congress or the executive in exercising war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of citizens and therefore may be the one most in need of an appropriate check and balance. In *Ex Parte Milligan*, 71 U.S. 125 (1866), the Court, in discussing whether constitutional safeguards may be restricted in times of crisis, held:

> Not one of these safeguards can the President, or the Congress, or the Judiciary disturb except the one concerning the writ of *habeas corpus*.

In *Korematsu* v. *United States*, 323 U.S. 214 (1944), the Court did not apply a lesser standard because of war-time emergency; indeed, it articulated for the first time the strict scrutiny test and found that the government had met its heavy burden.

Ordinarily deference is due to congressional and executive decisions in military matters. We are not here concerned with military operations or day to day conduct of the military into which we have no desire to intrude.

The issue before us is whether exclusion of women is substantially related to an important governmental function. This issue does not involve the court in determining how the military should utilize women in any given situation. The issue before us is the constitutionality of the total exclusion of women from the MSSA, not the extent to which the military services must utilize women.

We will examine the purported justifications for the gender based exclusion. If the purported justifications do not support this exclusion, or if the purported justifications are invalid as a matter of law, or if the purported justifications are contradicted by Congress's own actions or the overwhelming evidence on the record, then we will be required to declare the discriminatory statute unconstitutional.

B. Definition of The Question For Review

Before reviewing the evidentiary record it is important to define what we are reviewing under the standard delineated above. Before us is a program which requires the registration of males but completely excludes females from registration and possible induction into the armed services under the MSSA.

The defendants urge us to consider registration independently of induction because, as they argue, induction is not imminent. If we did what the defendants requested, this case would be simple. Registration of a class of citizens with absolutely no purpose would be unconstitutional under any standard of review. The imposition of the burden to register upon any class of citizens must be justified. The justification here should relate to the governmental need to raise military forces by conscription. We can consider the registration only in light of its justification.

Congress could not constitutionally require registration under the MSSA of only black citizens or only white citizens, or single out any political or religious group simply because those groups contain sufficient persons to fill the needs of the Selective Service System. It is not enough to show that their inclusion was needed; it would have to be shown that their exclusion was needed. In the instant case, the classification is gender-related and must meet the standard we found to apply in Section IIIA of this opinion. To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces.[13] We need

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[13] Government attorneys and representatives of the Department of Defense repeatedly explained to Congress that they could not justify the exclusion of women solely because there were enough males to meet any anticipated needs of the Selective Service System.

> [T]he question of military necessity for drafting women is irrelevant to the Constitutional issue, which is whether or not there is sufficient justification by what-

not decide if women must serve in all roles in the military, including combat. We need not decide if women must be conscripted in equal numbers to men.

This careful consideration of what issues are and are not before us should dispel any concern that we are injecting ourselves in an inappropriate manner into military affairs. *See Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Owens* v. *Brown*, 455 F.Supp. 291 (D.D.C. 1978).

C. The Application of the "Substantial Relationship" Test To Determine if Exclusively Male Registration is Constitutional

It is defendants' burden to establish that the exclusion of females from registration for selective service promotes an important government objective and is substantially related to the achievement of that objective. *Wengler* v. *Druggist's Mutual Insurance Co., supra.* Despite the extensive record compiled in this case defendants simply have not met this burden.[14]

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ever test the courts may apply for not registering women.

Testimony of Mr. Sims, Attorney for the Department of Justice before the Subcommittee on Manpower and Personnel of the Senate Armed Service Committee at 27 (March 19, 1980).

However, Congress generally continued to analyze the problem in terms of the need for women, not the need to exclude women.

[14] Other courts which have considered the constitutional issue before us in the context of a proposed male inductee's defense to a criminal selective service violation [*see* Goldberg v. Tarr, No. 71-1480, n.12 (E.D. Pa. Feb. 19, 1980)] have not had the benefit of the voluminous record submitted here which contains recent data on the performance of females in the military.

We have combed the record and the legislative history for purported justifications for the total exclusion of women from the MSSA, and we find each proffered justification unconvincing.[15]

The legislative history accompanying the renewal of registration and the rejection of female registration sets forth several arguments for the exclusion of women. Many of these arguments do not justify the

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[15] When the MSSA was adopted in 1948 an aura of male chauvinism permeated Congressional attitudes toward women in the military. During the same year Congress adopted a statute known as the Womens Armed Services Integration Act, 5 U.S.C. § 627. An example from the Congressional Record-House, June 2, 1948, page 6970 is illustrative:

> MR. VANZANDT: That is correct. We have a similar nurses organization for the Navy.
>
> Let me point out the position of the enlisted man. There is not a member of the House Committee on Armed Services who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a WAVE officer. Put yourself in the position of an enlisted man and I am sure you will agree with them.

The government has acknowledged that the legislative history of the 1948 Act is of little use to their case. Therefore, we will not examine that legislative history in depth.

> The reason for that is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress.

Testimony of Mr. Simms, Attorney for the Department of Justice, before the Subcommittee on Military Personnel of the Committee on Armed Services of the House of Representatives at 18 (March 5, 1980).

total exclusion of women.* The report of the full Senate Armed Services Committee states the following:

> The committee feels strongly that it is not in the best interest of our national defense to register women for the Military Selective Service Act, which would provide needed military personnel upon mobilization or in the event of a peacetime draft for the armed forces.
>
> The committee is aware of the significant contribution now being made to our armed forces by women in uniform. The number of women in the military has increased significantly in the past few years and is expected to continue to increase.
>
> . . . .
>
> Women now volunteer for military service and are assigned to most military specialties. Of all the various kinds of enlisted skills in the Army, only 6 percent are closed to women as a result of the exclusion of women from combat. But these include infantry specialists, armor specialists, combat engineers and positions in field artillery and air defense. It is in these skills, and more specifically in the many positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. Even in peacetime, although only 6 percent of Army enlisted skills are closed to women, fully 42 percent of all *billets* filled by enlisted personnel in the Army

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* [The opinion, as issued on July 18, 1980, had inadvertently omitted the first seven words of this sentence. The error was corrected by an order of the district court dated July 22, 1980.]

are in specialities, skills or units not available to women. Consequently, there is no need to draft large numbers of women in event of mobilization or for the skills that the Army has difficulty in recruiting for in peacetime.

In addition, there are military reasons that preclude very large numbers of women from serving. Military flexibility requires that a commander be able to move units or ships quickly. Units or ships not located at the front or not previously scheduled for the front nevertheless must be able to move into action if necessary. In peace and war, some rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support. Some non-combat positions must be available to which combat troops can return for duty before being redeployed.

The committee also feels that any actual induction under the Military Selective Service Act should be performed equitably based on random selection, and as efficiently as possible. But this principle creates additional mobilization problems if women were included. Meeting a large requirement will not be easy in any event, and the committee feels that inflating the total for positions not directly needed for combat would impede the mobilization process. Processing and training would be needlessly burdened by women recruits who could not be used in combat. If more people can be processed, they should also be directed to the combat positions which need to be filled.

Other administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist but are less important than military reasons.

> Registering women for assignment to combat or assigning women to combat positions in peacetime then would leave the actual performance of sexually mixed units as an experiment to be conducted in war with unknown risk—a risk that the committee finds militarily unwarranted and dangerous. Moreover, the committee feels that any attempt to assign women to combat positions could affect the national resolve at the time of mobilization, a time of great strain on all aspects of the Nation's resources.

Requiring Reinstitution of Registration for Certain Persons Under the Military Selective Service Act, and for Other Purposes, Report No. 96-226 to accompany S.109 at 8-9 (9th Cong. 1st Sess.).

The Subcommittee on Manpower and Personnel made the following specific findings of fact:

> 1) Article I, section 8 of the Constitution commits exclusively to Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the Congress to determine the occasions for expansion of our armed forces, and the means best suited to such expansion should it prove necessary.
>
> 2) An ability to mobilize rapidly is essential to the preservation of our national security.
>
> 3) A functioning registration system is a vital part of any mobilization plan.
>
> 4) Women make an important contribution to our national defense, and are volunteering in increasing numbers for our armed services.
>
> 5) Women should not be intentionally or routinely placed in combat positions in our military services.

6) There is no military need to include women in a selective service system.

7) Present manpower deficiencies under the All-Volunteer Force are concentrated in the combat arms—infantry, armor, combat engineers, field artillery and air defense.

8) If mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements.

9) The need to rotate troops and the possibility that close support units could come under enemy fire also limits the use of women in noncombat jobs.

10) If the law required women to be drafted in equal numbers with men, mobilization would be severely impaired because of strains on training facilities and administrative services.[16]

11) Under the Administration's proposal there is no proposal for exemption of mothers of young children. The Administration has given insufficient attention to necessary changes in Selective Service rules, such as those governing the induction of young mothers, and to the strains on family life that would result from the registration and possible induction of women.[17]

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[16] We need not consider the impact of equal induction of men and women since that issue is not before us, as explained above. We are only considering the total exclusion of women.

[17] We need not consider the argument that mothers of young children should not be drafted. That issue is not before us. The policy for deferring or exempting certain women from the Selective Service System for justifiable grounds may be established by Congress. See Deposition of Richard Danzig, Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics at 14 (May 14, 1980). The issue before us is the total exclusion of women from registration, not the required induction of certain women into the armed services.

12) A registration and induction system which excludes women is constitutional.

Report of the Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women under the Military Selective Service Act at 7-8.[18]

Defendant's main argument may be summarized as follows: women cannot fill all positions in the armed services, especially combat positions; in a time

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[18] Certain potential justifications can be dealt with summarily. No argument was made by defendants that the exclusion of women from the MSSA was justified on the grounds that it remedies past discrimination against women. *Cf.* Fullilove v. Klutznick, 49 L.W. 1005 (S.Ct. July 2, 1980).

Also, defendants did not actively pursue the arguments that pregnancy and menstruation adversely affected the military's ability to utilize women. Women in the military as a group suffer only about half the lost time of men. Dept. of Defense, Background Study—Use of Women in the Military at 28 (2d Ed. 1978); Dept. of the Navy, Pregnancy in the Navy: Impact on Absenteeism, Attrition, and Workgroup Morale at vii, viii, 37 (1978).

The height and weight differences of the female population exist but are not considered insurmountable, and at times can be an advantage. Oriental men are also significantly lighter and shorter than Caucasians on the average, but this in no way precludes their use in the military, nor has it precluded various Asian nations from fielding very effective fighting forces. *See* Dept. of Defense, Background Study—Use of Women in the Military at 25-27 (2d Ed. 1978). The increased successful utilization of women in the armed forces, and the fact that the issue of women in combat is not before us removes the need to go into depth on this issue.

One question often raised is whether men and women can serve together efficiently in the Armed Services.

of mobilization the primary need of the military services will be in combat related positions and in support position personnel who can readily be deployed into combat; therefore, in order to maximize the flexibility of personnel management, women should be excluded from the MSSA.[19] Further, defendants argue that we

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Perhaps the best answer is that they are doing so now without apparent difficulty.

Presidential Recommendations for Selective Service Reform: A Report to Congress Pursuant to P.L. 96-107 at 14 (Feb. 11, 1980).

The Director of the Selective Service System testified that there are no administrative obstacles to running a registration and induction process including both males and females. Deposition of Bernard Rostker at 17-18 (May 13, 1980). There is no contradictory evidence in the record.

According to the Selective Service System seventy-two countries in the world have military conscription, and ten of these register or conscript both men and women. None use women in combat. Testimony of Bernard T. Rostker, Director of the Selective Service System, before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 36-37 (March 19, 1980).

[19] Counsel have termed this the "Battle of the Bulge" argument.

GENERAL ROGERS. Mr. Chairman, may I add a footnote to my comment to Senator Warner?

SENATOR NUNN. Yes, General.

GENERAL ROGERS. One thing which is often lost sight of, Senator, is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks.

should defer to the congressional determination that this is the best way to run our armed forces. This argument is superficially appealing but is found lacking upon closer examination.[20]

SENATOR WARNER. General Patton did that at one time, I believe at the Battle of the Bulge.

GENERAL ROGERS. Absolutely.

Now, if that support base and that operating base to the rear consist in large measure of women, then we don't have that opportunity to reach back and pull them forward, because women should not be placed in a forward fighting position or in a tank, in my opinion. So that, too, enters the equation when one considers the subject of the utility of women under contingency conditions.

Testimony of General Bernard W. Rogers, Chief of Staff, United States Army, before the Subcommittee on Manpower and Personnel of the Committee on Armed Services of the United States Senate at 16 (March 13, 1979); *see also* Deposition of Major General R. Dean Tice at 30 (May 13, 1980). As noted below, this problem was taken into account when the armed services estimated they could utilize significant numbers of female inductees in a time of military mobilization.

General Rogers, himself, testified in favor of the registration of women. *See* note 30, *infra*.

[20] There was some support on the record for the "Battle of the Bulge" argument in the form of opinion testimony taken at depositions in 1976. *See* Deposition of Major General Robert G. Gard, Jr., Commander of the United States Army Military Center (December 21, 1976); Deposition of John F. Ahearne, Principal Deputy Assistant Secretary of Defense for Manpower and Reserve Affairs (October 19, 1976). We discounted this testimony for obvious reasons. This testimony came from military personnel before all the empirical military studies and the increased utilization of women in the armed forces described below. The current

In a time of military mobilization the Department of Defense (DOD) estimates that it would require approximately 650,000 inductees within the first six months, and that it could advantageously use 80,000 women among the 650,000 inductees. The DOD's view is that women would be useful in a mobilization, though not necessary since there is a sufficient male population to supply the 650,000 inductees.[21]

There are presently 150,000 women on active service in the armed forces. By 1985 it is projected that there will be 250,000. The projection of 80,000 women inductees in a time of mobilization reflects needs in addition to the 150,000 to 250,000 women who would already be in the services and takes into account the statutory and policy restrictions on women in combat.[22] Testimony of Robert B. Pirie, Assistant

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uniform opinion of the armed services and Department of Defense is that women inductees could be utilized, and that it would be valuable to include women in the pool of registrants available for the draft.

[21] Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower Personnel of the Senate Armed Services Committee at 23 (March 19, 1980); Testimony of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Military Personnel of the Committee on Armed Services of the House of Representatives at 2 (March 5, 1980).

[22] With the advent of the Korean War an unsuccessful effort was made to recruit some 100,000 women to meet rapidly expanding personnel requirements. Dept. of Defense, Background Study—Use of Women in the Military at 3 (2d Ed. 1978). It is very possible that the utilization projection for women may not be filled solely through volunteers, just as the nation's total needs may not be filled by volunteers. That is the reason for a selective service system.

Secretary of Defense for Manpower, Reserve Affairs and Logistics, before the Subcommittee on Military Personnel of the Armed Services Committee of the House of Representatives at 35-39 (March 5, 1980). As was further explained to Congress, the figure of 80,000 female inductees does not represent an estimate of the number of positions women could fill—i.e. noncombat, noncombat reserve positions—but represents the number of female inductees that would be of overall benefit to the effectiveness of a mobilization plan. *Id.* at 49-50. The scenario envisioned is as follows: upon a military mobilization the immediate need would be combat troops; [23] male inductees cannot be moved into basic combat positions until after twelve to fourteen weeks of training, and considerably more for highly skilled combat positions; the only immediate deployable source of combat trained manpower would be existing male military personnel on noncombat assignment; the immediately deployable male military personnel are, to a substantial degree, in positions where they do clerical and typing work, nursing and other similar jobs which in the civilian

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[23] Historically, approximately one out of seven, and by some estimates less than one out of ten, male inductees have been utilized in combat roles. Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics and remarks of Senator Cohen before the Subcommittee on Manpower and Personnel of the Senate Armed Forces Committee at 47 (March 19, 1980); Remarks of Senator Warner, *id.* at 61. However, it is clear at certain times in history the requirement for combat troops has escalated for short periods of time. This is probably less likely in this time of high technology warfare.

work force are disproportionately filled by women;[24] the pool of female registrants would have a strong concentration of skills not largely available among the pool of male registrants;[25] thus inducted women

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[24] Mr. Weinberg: During war time were conscripts placed in noncombat specialties, clerical, secretarial roles for example?

Major General Tice: Certainly.

Deposition of Major General Tice, Deputy Assistant Secretary of Defense for Military Personnel Policy at 10-11 (May 13, 1980).

[25] As a representative of the DOD testified:

A The Department has been explicit in public testimony that we cannot fight a war with a volunteer Army, we would immediately request authority to resume the operation of the Selective Service System in a national emergency.

Q So that when you say in case of war, it would still be true that the women in the armed forces are doing work essential to the readiness and capability of the forces and that the number doing similar work would inevitably expand beyond the peacetime number, that is in full contemplation of there being a draft during the war situation?

A Yes.

Q Now on page two of your prepared testimony, you comment on the advantage of registration of women because it would provide a pool of trained personnel in areas where women have traditionally held the majority of jobs. When you say where women have traditionally held the majority of the jobs—such as administrative, clerical, health care medical fields—are you talking about women in the military or women in society at large?

A Women in society at large.

Q So that the pool of trained personnel from which the military could hope to obtain those same skills for its expanded needs in wartime would be primarily a female pool?

could be moved into noncombat jobs with little or no training and release men for immediate deployment into combat. Inducted women could complete work left undone by the combat deployment of the men in noncombat units.[26]

A Yes. To the extent that that is true of the society at large, yes, that's true.

Deposition of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics at 12-13 (May 13, 1980). Of course this does not mean that women volunteers or inductees would not serve in many other non-traditional roles.

In the Vietnam conflict, more than 7,000 women served in support roles which qualified for combat pay. Statement of Bernard D. Rostker before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 2 and 6 (March 19, 1980).

Tested in both long term and short term combat related field exercises it was found that women in support units and unit headquarters above battalion size, in levels up to thirty-five percent, did not adversely affect unit performance. Dept. of Defense, Background Study—Use of Women in the Military (2d Ed. 1978).

The role of women in the military has been constantly expanding and the success of this expansion has continuously encouraged further expansion. *See* Department of Defense, Background Study—Use of Women in the Military; Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces (1978); Presidential Recommendations for Selective Service Reform; A Report to Congress Pursuant to P.L. 96-107 (Feb. 11, 1980). The illustration above is one scenario where the skills in the female population would be a positive benefit to military mobilization.

[26] The following testimony is illustrative:

Mr. Pirie. That is correct, we would choose them for positions that the Armed Forces could effectively use them for, as I said before.

Secondly, as I also said before, it is reasonable in a limited pool to expect people who are trained and have skills that would be immediately available and very useful, such as fire protective skills and medical skills, releasing men who would be immediately deployable.

The problem with the drafted man is that it takes twelve weeks of training to make that man employable. However, a woman who is drafted would require little, if any, training to move into a noncombat job to release a man who had previous training who was immediately deployable.

Mr. Wincup. For this purpose you are saying to release another. That could be a man or a woman.

Mr. Pirie. It could be a man or woman. As I pointed out on some of these things it might take time to train a man whereas if you had a woman already trained in that noncombat skill that would be a plus.

Testimony of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, before the Subcommittee on Military Personnel of the Armed Services Committee of the House of Representatives at 49-50 (March 5, 1980).

Mr. Pirie explained more fully at his deposition:

Q The concept of freeing individuals who are already in the service for combat use is the topic that I am raising here.

A It is very important, because by law we are not allowed to deploy individuals who have been conscripted from civilian life to combat theaters for the purpose of combat unless they have a minimal amount of training.

Q That minimum is specified in the statute?

A That minimum is specified in the statute, and it's my recollection that it's 14 weeks. So there is a serious question about what you do between week one and week 14 if you are short people to engage in combat.

. . . .

Q But in order to meet that 380,000 man shortfall in the combat slots, would the people already in the military in noncombat slots comprise the most readily

"The purpose of registration is to equip us with information so that if we had a national mobilization, we could move quickly to achieve our wartime personnel requirements with greater effectiveness." Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 34 (March 19, 1980).[27]

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available source for picking up that shortfall, for meeting that shortfall?

A Yes. The armed forces would, I believe, strip what are called TDA units, that is, units that are not combat-deployable units to provide individuals as fillers.

Q And in terms of continuing to fulfill the overall mission objectives of the armed force, would the quality of the immediate replacements of those people be an important factor in the TDA area?

A Yes. The TDA units have an immensely important job in themselves to perform because they support the mobilization of the manpower that is to come beyond. That includes organizing the services of supply, organizing and training the movement of units while they are still in the United States, and a host of different things. So it is very important that those TDA units, if they are used, be supplemented.

Deposition of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics at 20-25 (May 13, 1980). Section 4a of the MSSA, 50 U.S.C. App. § 404(a), contains the twelve week training requirement.

[27] As described, the skills concentrated in the female population, ages 18 to 26, and not equally concentrated in the analogous male population can be highly valuable to the military. Testimony of Richard Danzig, Principal Deputy Assistant Secretary for Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower

> If women were registered . . . we would have a very large pool of women whose location would be known, and who would be available to be called up, classified and examined in case induction or conscription were required by national emergency. The Armed Services would have to determine the number of women that they needed both for purposes of expanding the forces and support forces and the support jobs that they have to do, and also for releasing men from the support functions to combat functions.

Testimony of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, before the Subcommittee on Military Personnel of the Armed Services Committee of the House of Representatives at 28-30 (March 5, 1980). Thus, military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it.

It is difficult for us to accept the inconsistent positions of Congress. Congress has continuously allocated funds for the increase of the number of women in the armed services, in both absolute terms and as

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and Personnel of the Senate Armed Services Committee at 60 (March 19, 1980).

A special skills draft, though not used in the past in this country except for medical doctors, is not an impossible alternative in a time of military need. Testimony of Richard Danzig, Principal Deputy, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 60 (March 19, 1980). A skills draft is obviously more manageable now that we have greatly improved computer technology which could instaneously inform selective service of the names of registrants with particularly needed skills if such information was gathered and programmed for retrieval.

a percentage of total forces.[28] There can be no doubt that the experience of women in the all volunteer army has been a success story. Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 48-50 (March 19, 1980).

It is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants

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[28] Women have increased from .78 percent of the armed services in 1967 to over five percent in 1977, and to eight percent today. Dept. of Defense, Background Study—Use of Women in the Military at 5 (2d Ed. 1978). The projection is for women to comprise twelve percent of the armed forces by 1985. Presidential Recommendations for Selective Service Reform: A Report to Congress Pursuant to P.L. 96-107 at 42, Record at 289 (Feb. 11, 1980).

The army has been significantly expanding the positions open to women. U.S. Army, Evaluation of Women in the Army (1978) Record at 634; Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 75 (1978). "These changes in Army policy are not whims, but are based on extensive study." Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 76 (1978). In the mid-1970's Congress opened the military service academies to women. *E.g.* 14 U.S.C. § 182(a). Congress repealed the statutes excluding women from combat in the army when it abolished the Women's Army Corps as a separate entity within the regular Army. 92 Stat. 1627, repealing, 10 U.S.C. § 3071. If we were to accept defendants' argument that the exclusion of women is necessary for an effective armed service, the inevitable sequitur of these increased numbers is that the military is intentionally and progressively weakening our armed forces.

available for induction. Congress allocates funds so that the military can use and actively seek more female recruits but nonetheless asserts that there is justification for excluding females from selective service, despite the shortfall in the recruitment of women.[29] Congress rejects the current opinion of each of the military services and asserts that women can contribute to the military effectively only as volunteers and not as inductees.[30]

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[29] The army has experienced a twenty-five percent shortfall of its objectives in the recruitment of women. Testimony of General Bernard W. Rogers, Chief of Staff, United States Army, before the Subcommittee on Manpower and Personnel of the Committee on Armed Services of the United States Senate at 14 (March 13, 1979).

[30] The representatives of the various armed services all testified that they would have no objection to the registration of women. Testimony of General Bernard W. Rogers, Chief of Staff, United States Army, Admiral Thomas B. Hayward, Chief of Naval Operations, General Lew Allen, Jr., Chief of Staff, United States Air Force, and General Louis W. Willson, Commandant, United States Marine Corps before the Subcommittee on Manpower and Personnel of the Committee on Armed Services of the United States Senate at 10-11 (March 13, 1979).

> [W]omen should be required to register . . . in order for us to have an inventory of what the available strength which is within the military qualified pool in this country.

Testimony of General Bernard W. Rogers, Chief of Staff, United States Army before the Subcommittee on Manpower and Personnel of the Committee on Armed Services of the United States Senate at 10 (March 13, 1979).

> From my standpoint looking at the situation, the starting point is looking out at the mobilization population, its potential, and confronting the question, do we wish to exclude from the potential availability for

mobilization some 51 percent of the young people of this country?

If in fact there were good military reasons for their exclusion, I would personally favor their exclusion and leave it to the courts to make their own decision. If there are not reasons for excluding that portion of the population, then in fact I would register women and leave to the courts what judgments the courts would make.

Our conclusion is that there are good reasons for registering those people. Our conclusion is even more strongly that there are not good reasons for refusing to register them. I think all the comments about burdens and about what the courts may do and so forth is just reflective of an underlying reality and not any subtle intricacies of case law.

Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 28-29 (March 19, 1980).

Mr. Montgomery. Why do we want to clutter up the situation by talking about women? What we are really going to need, what the military needs now, both the Army and the National Guard, we need men. We need men to fill the combat roles. We don't need women. Why do we want to create a problem? We have a hard enough time to get men in peacetime registration.

Mr. Pirie. Not only will we need to expand combat arms, as I say, that is the pressing need, but we also have to expand the support establishment at the same time because that meets the situation where the combat arms can carry out their function successfully, and the support establishment now uses women very effectively, and in wartime I think the same would be true.

Testimony of Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, before the Subcommittee on Military Personnel of the Committee on Armed Services of the House of Representatives at 24-25 (March 5, 1980).

It is in the interest of national security that, in an emergency requiring the conscription for military serv-

The President, the Director of the Selective Service System, and representatives of the Department of Defense informed Congress that including women in the pool of women eligible for induction would increase military flexibility. The record reveals that in almost any conceivable military crisis the armed forces could utilize skills now almost entirely concentrated in the female population of the nation. Congress itself has appropriated funds for the increased recruitment and utilization of women in the armed services.

The problem with defendants' argument is that the record before us proves that there already is extensive utilization of females in the military and that this utilization will substantially increase. The die is already cast for substantial female involvement in

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> ice of the nation's youth, the best qualified people for a wide variety of tasks in our armed forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women. The Administration strongly believes they should be available for services in the jobs they can do.

Statement of Robert B. Pirie and Bernard Rostker before the Subcommittee on Military Personnel of the Armed Services Committee of the House of Representatives at 2 (March 5, 1980).

> [S]hould I say in advance that I will only take men and refuse to take women, the answer to that I think is no, I have no basis for saying that.

Testimony of Richard Danzig, Principal Deputy Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee at 62 (March 19, 1980).

the military. Furthermore, the military does not lose flexibility if women are registered because induction calls for females can be made according to military needs as they accrue in the future.[31] Though military

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[31] At the March 5, 1980, hearing held by the Subcommittee on Military Personnel of the Armed Services Committee of the House of Representatives, Robert P. Pirie, Jr., Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics testified:

> It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men (ages 18 to 26) is sufficiently large to meet projected wartime requirements. Furthermore, men, unlike women, can be assigned to any military position including close combat jobs.
>
> However, women can be used in large numbers in the peacetime and wartime force. The maximum number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as ground combat roles, for men only, and (3) the need to reserve a substantial number of non-combat positions for men in order to provide a pool of ready replacements for ground combat positions.
>
> A change in the Selective Service Act to permit the registration and induction of women would not necessarily mean that significant numbers of women would be drafted. If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly. We estimate that this might require at least eighty thousand additional women over the first six months. If there were not enough women volunteers, a separate draft call for women would be issued.

flexibility might call for less utilization of female inductees than male inductees in a given crisis situation, it is the antithesis of "flexibility" to exclude women from the pool of registrants that could be called upon in a time of national need.

IV. CONCLUSION

It is undisputed that the MSSA creates a gender-based classification and that the government has the burden of justifying that classification. The principal reason the government proffers for a male-only registration is that it provides military flexibility. The record here, however, reveals that women do serve a useful role in the military and provide important skills. The foregoing discussion also illustrates that flexibility is not enhanced, but is in fact limited by the complete exclusion of women. We therefore hold that the complete exclusion of women from the pool of registrants does not serve "important governmental objectives" and is not "substantially related," *Craig* v. *Boren*, *supra* at 197, to any alleged government interest. Thus, the MSSA unconstitutionally discriminates between males and females. Declaratory and injunctive relief will be granted.

The President's decision to ask for authority to register women is based on equity. It is a recognition of the reality that both men and women are working members of our society and confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military is no exception. Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG

v.

BERNARD ROSTKER, ET AL.

ORDER

AND NOW, this 18 day of July, 1980, IT IS ORDERED that:

1. The class is hereby redefined to include:

   All male persons who are registered under 50 U.S.C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U.S.C. App. §§ 454, 456(h) and 467(c); and who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System.

2. The Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.* is declared to be in violation of the Fifth Amendment to the United States Constitution for the reasons set forth in the accompanying opinion.

3. Defendants are hereby permanently enjoined from requiring the registration under the Military Selective Service Act of any member of the plaintiff class.

4. Defendants' counsel shall, within ten days, repaginate the Joint Documentary and Stipulated Record, Volumes I through IV, inclusive, in a legible manner, and submit the same to this court. Defendants' counsel shall, with the submission of the repaginated Joint Documentary and Stipulated Record, supply this court with the record page citation for each record citation in the accompanying opinion.

BY THE COURT:

/s/ Max Rosenn
MAX ROSENN
Circuit Judge

/s/ Joseph S. Lord, III
JOSEPH S. LORD, III
Chief District Judge

/s/ Edward N. Cahn
EDWARD N. CAHN
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS

v.

BERNARD ROSTKER, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252, 1253, and 2101, from the judgment entered in this action by the three-judge District Court on July 18, 1980.

Dated at Washington, D.C. this 18th day of July, 1980.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General
PETER F. VAIRA
United States Attorney
WILLIAM Z. ELLIOTT

By: /s/ David J. Anderson
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Attorneys for Defendants

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-70

BERNARD ROSTKER, Director of Selective Service, ET AL., APPLICANTS,

v.

ROBERT L. GOLDBERG, ET AL.

ON APPLICATION FOR STAY

[July 19, 1980]

MR. JUSTICE BRENNAN, *Circuit Justice.*

This is an application for a stay pending review on appeal of the July 18, 1980 order of a three-judge district court for the Eastern District of Pennsylvania invalidating the registration provisions of the Military Selective Service Act, 50 U.S.C. App. § 451 *et seq.*, and enjoining the Government from enforcing them.[1] At stake are the Government's plans to reg-

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[1] Briefly, the procedural history of this case is as follows: The original complaint was filed in June 1971 by male citizens subject to registration and induction who argued that the Selective Service Act violated several of their constitutional rights, including the right to equal protection of the laws guaranteed by the Fifth Amendment. Application to the United States District Court for the Eastern District of Pennsylvania for the convening of a three-judge court under the then-applicable statute, 28 U.S.C. § 2282, was denied and the suit was dismissed. On review, the United States Court of Appeals for the Third Circuit upheld the dismissal of all claims except that founded upon the failure to conscript females. The Court of Appeals remanded the case to the District Court for a determination of the substantiality of the equal protection claim, and of plaintiffs' standing to

ister more than four million males born in 1960 and 1961 in the two weeks commencing on July 21.

The District Court concluded that the exclusion of females from the registration provisions constitutes gender-based discrimination and that the federal parties had failed to demonstrate that the exclusion was substantially related to an important governmental interest. Accordingly, it found the provisions violative of the equal protection component of the Fifth Amendment. The applicants, Bernard Rostker, Director of Selective Service, et al., urge both that the District Court applied too strict a standard of scrutiny in light of the national defense interests at stake, and that even under the standard which that court applied the decision not to include females could be justified. Beyond that, the Government contends that it will suffer irreparable injury if it is not permitted to go forward with implementation of the President's July 21 through August 2 call for draft registration, while respondents—a class including persons required to register within the next two weeks—will suffer

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raise that issue. On remand, the District Court found that plaintiffs had standing, and convened a three-judge court.

On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, denied defendants' motion to dismiss. *Rowland* v. *Tarr*, 378 F. Supp. 766 (E.D. Pa. 1974). There were no further proceedings until June, 1979, when the court proposed to dismiss the case due to inaction. Additional discovery ensued, and on February 19, 1980, defendants' motion for summary judgment was denied. On July 1, 1980, a plaintiff class of potential registrants was certified, and on July 18, 1980, the District Court entered its order enjoining registration under the Selective Service Act and declined to enter a stay of execution.

Although the statute authorizing three-judge courts in actions such as this was repealed in 1976, Pub. L. 94-381, §§ 1 & 2, 90 Stat. 1119 (Aug. 12, 1976), the act remains applicable to suits filed before the date of repeal, *id.*, § 7, 90 Stat. 1119.

only minor and remediable harms should I decide to stay the District Court's injunction. Respondents submit that the three-judge court properly decided the constitutional question before it, that its injunction was proper, and that its subsequent decision to deny a stay of that injunction was likewise appropriate.

The principles that control a Circuit Justice's consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. *Whalen* v. *Roe*, 423 U.S. 1313, 1316-1317 (1975) (Marshall, J., in chambers). In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction, *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (Powell, J., in chambers); *Mahan* v. *Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers). Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. *Times-Pacayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers); *Graves* v. *Barnes*, *supra*, at 1203-1204. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. *Whalen* v. *Roe*, *supra*, at 1316; *Graves* v. *Barnes*, *supra*, at 1203. And fourth, in a

close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large. Cf. *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (Marshall, J., in chambers) (citing cases); *Republican Committee* v. *Ripon Society*, 409 U.S. 1222, 1224 (1972) (Rehnquist, J., in chambers).

That the first prong of this test is satisfied is undeniable. The importance of the question and substantiality of the constitutional issues are beyond cavil. The second prong is more troubling. In my judgment the case is a difficult and perplexing one. My task, however, is not to determine my own view on the merits, but rather to determine the prospects of reversal by this Court as a whole. In the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate, compare *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), with *Craig* v. *Boren*, 429 U.S. 190 (1976). And my Brethren's application of the standard upon which we have finally settled in a context as sensitive as that before me cannot be predicted with anything approaching certainty. Nonetheless, it does seem to me that the prospects of reversal can be characterized as "fair." I therefore turn to the interrelated inquiries that make up the third and fourth prongs of the approach set forth above.

The Government identifies three distinct injuries that the United States would sustain if the District Court's order were to remain in force and this Court were then to uphold the Selective Service Act. First, during the life of the District Court's injunction, the United States is barred from instituting registration without time-consuming congressional action, even in the face of a clear and present threat to na-

tional security. Accordingly, the nation's military capability to respond to emergencies would remain uncertain until the full Court completes review of the ruling below.[2] See Affidavit of W. Graham Claytor, Deputy Secretary of Defense, at 2 (July 16, 1980); Affidavit of Bernard Rostker, Director of Selective Service, at 2 (July 15, 1980). Second, the inauguration of registration by the President and the Congress was not merely a predicate to possible future conscription. It was an act of independent foreign policy significance—a deliberate response to developments overseas. Thus, a suspension of registration until a decision on its validity is reached might frustrate coordinate branches in shaping foreign policy. Affidavit of John P. White, Dep. Dir. of OMB, at 2-4 (July 15, 1980); Affidavit of W. Graham Claytor, *supra*, at 3; Affidavit of Warren Christopher, Deputy Secretary of State, at 1-2 (July 12, 1980).[3] Third, considerable resources have been expended in preparation for the imminent registration effort. The Government has distributed publicity material, trained and assigned personnel, engaged computer support, and entered into contractual arrangements, all with a view toward the commencement of actual

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[2] Further, inasmuch as Congressional appropriations for registration lapse on September 30, 1980, at the end of the current fiscal year, Affidavit of John P. White, Dep. Dir. of OMB, at 6 (July 15, 1980), a decision by the full Court in favor of the Government after that date will necessitate additional delay while Congress authorizes a new appropriation.

[3] To be sure, the extent and duration of these irreparable injuries could be curtailed if the Government were substantially to amend the Selective Service Act during the period preceding review by this Court. In light of the serious question raised by this case, however, the Government should not be obliged to abandon an important statutory scheme without an opportunity for plenary consideration by the Court.

registration on Monday, July 21. Should the Government ultimately prevail at some future date, these preparations will have to be replicated at considerable expense. Affidavit of Bernard Rostker, *supra*, at 4-5; Affidavit of John P. White, *supra*, at 6. While difficult to evaluate with precision, these are considerations of palpable weight.

For their part, respondents urge that should they eventually succeed on the merits they will have suffered irreparable injury by virtue of having had to register during the pendency of the Government's appeal. But although registration imposes material interim obligations upon respondents—including the duty to appear—I cannot say that the inconvenience of those impositions outweighs the gravity of the harm to the United States should the stay requested be refused. Nor does an irremediable injury stem from the fact that respondents' names will be enrolled upon registration lists. If respondents' claim is upheld, the destruction of those lists can be ordered. On balance, therefore, I conclude that the equities favor the Government. Accordingly, I have today entered an order staying execution and enforcement of the District Court's judgment.

SUPREME COURT OF THE UNITED STATES

No. A-70

BERNARD ROSTKER, Director of Selective Service, ET AL., APPLICANTS,

v.

ROBERT L. GOLDBERG, ET AL., RESPONDENTS.

ORDER

UPON CONSIDERATION of the application of the Solicitor General and of the memorandum of respondents in opposition thereto,

IT IS ORDERED, for the reasons stated in the opinion filed this date, that the execution and enforcement of the order of the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 71-1480) dated July 18, 1980, is stayed, with the exception of paragraph 4 (relating to pagination and submission of the record), pending timely docketing of an appeal in this Court. If an appeal is so timely docketed, this order is to continue in effect pending the issuance of the judgment of this Court.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 19th

day of July, 1980

APPENDIX E

Pertinent provisions of the Military Selective Service Act are as follows:

Section 3, 50 U.S.C. App. 453:

> Except as otherwise provided in this title [sections 451, 453, 454, 455, 456, and 458 to 471a of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a) (15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

Section 4(a), 50 U.S.C. App. 454(a):

> Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458 to 471a of this Appendix], every person required to register pursuant to section 3 of this title [section 453 of this Appendix] who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register pursuant to section 3 of this title [section 453

of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: *Provided*, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further*, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [sections 451, 453, 454, 455, 456, and 458 to 471a of this Appendix] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

* * * *

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No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX

JURISDICTIONAL STATEMENT FILED AUGUST 19, 1980
PROBABLE JURISDICTION NOTED DECEMBER 1, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

Date		Proceedings
1	June 16	Complaint filed
	June 16	Summons exist
2	June 25	Plffs motion for the convening of a statutory three-judge Court and memorandum, filed.
3	June 30	Summons returned, "on 6-18-71 by certified mail served Henry R. Sherrard" & 6-22-71 served Curtis Tarr Natl. & John Mitchell, Attorney General," on 6-17-71 served Louis C Bechtle," on 6-22-71 served Local Board No. 138", filed.
4	July 1	Plf's Notice of Change of Address filed.
5	July 23	Defs' Reply to Motion of Plf. for the convening of a Statutory Three-Judge Court and Defs' Motion to Dismiss filed.
6	July 23	Defs' Memorandum in support of Defs' opposition to Plfs' Motion for a Three Judge Court and Defs' Motion to Dismiss filed.
7	Aug 16	Stipulation and Order extending time for Plffs. to file responsive pleadings, etc. in support of Motion for convening of a statutory 3-Judge court and Defts' Motion to Dismiss to 9/10/71, field. JG
8	Sep. 8	Plff's motion for extension of time for determination of whether the case is to be maintained as a class action, filed.
9	Sep. 10	Plff's memorandum in opposition to deft's motion to dismiss, filed.

Date		Proceedings
10	Sep. 10	Plff's reply Memorandum in support of their motion for the convening of a Three Judge Court, filed.
	Nov. 16	Argued sur plff's motion for convening a 3 Judge Court. C.A.V. JG
	Nov. 16	Argued sur Govt's motion to dismiss the complaint. C.A.V. JG
11	Nov. 30	Defts' supplemental memorandum in opposition to plffs' motion for a Three-Judge Court, and in support of defts' motion to dismiss, filed.
12	Dec. 7	Plff's supplemental reply memorandum in support of motion for a Three-Judge Court and in opposition to defts' motion to dismiss, filed.
1972		
13	Apr. 17	Motion of plffs. for consolidation or in the alternative to intervene, and memorandum in support thereof, filed.
14	Apr. 17	Defts' motion for extension of time to respond to plffs' motion for consolidation, etc., filed.
15	Apr. 18	Order GRANTING defts' motion for extension of time to respond to plffs' motion, filed. (4-19-72 entered and copies mailed) JL
16	Apr. 25	Deft's memorandum opposing motion for consolidation or in the alternative, leave to intervene, filed.
17	Apr. 27	Memorandum, GORBEY, J., and Order that plffs' application for a three-judge court is DENIED, and that defts' motion to dismiss the complaint is GRANTED, filed. (4-27-72 entered and notice mailed) JG
18	May 1	Plffs' notice of appeal, filed.

Date		Proceedings
19	May 1	Copy of Clerk's notice to U.S. Court of Appeals, filed.
	May 1	Original record transmitted to U.S. Court of Appeals.
20	May 2	Order that plffs' motion for consolidation or in the alternative to intervene is DENIED as moot, filed. (5-2-72 entered and copies mailed) JG
	May 5	Plffs' bond for costs on appeal in the sum of $250.00, with Fidelity & Deposit Co. of Maryland as surety, filed.
21	May 17	Certified copy of Order, U.S. Court of Appeals, denying appellant's motion for an expedited hearing, etc., filed. (Coy to Judge Gorbey) F.VD
22	May 24	Order that motion of plffs. in Roland, et al v. Tarr, et al, Civil Action No. 71-1480, to consolidate said action with Atlee, et al v. Laird, Civil Action No. 71-2324, is DENIED as moot, filed. (5-25-72 entered and copies mailed) JL
1973		
	Mar 27	1st supplemental record transmitted to U.S. Court of Appeals,
	Jun 5	Record on appeal returned.
23	Jun 5	Certified copy of Order, U.S. Court of Appeals, issued in lieu of formal mandate, that the judgment of the District Court filed 4-27-72 is hereby VACATED AS TO COUNT III, and in all other respects is affirmed—the cause being remanded to the District Court for further proceedings in accordance with the opinion of this Court, filed. (Copy to Judge Gorby)
24	Nov 9	Deft's motion to dismiss Count 3 of the Complaint, filed.

Date		Proceedings
25	Nov 9	Deft's brief in support of motion to dismiss Count 3, filed.
26	Nov 9	Plffs' memorandum in opposition to motion to dismiss Count 3, filed.
1974		
27	Feb 22	Govt's. supplemental memorandum in support of motion to dismiss Count #3 of complaint, filed.
28	Mar 28	Order that plff. shall advise the Court of sections of Selective Service Act which are subjects of this action; that the Court will request the convening of a statutory court; and that deft's motion to dismiss will be held for decision by the statutory court, filed. (3-29-74 entered and copies mailed)) JG-C1k
29	Apr 10	Order constituting a Three Judge Court that Hon. Max Rosenn U.S. Circuit Judge and Hon. Joseph S. Lord 111, Chief Judge to sit with Hon. H. Gorbey for the hearing and determination of this action, filed. 4-11-74 entered & copies mailed
30	Apr 17	Order that whenever counsel for plff. file a motion etc, with clerk of court they shall also send a copy of documents to the chambers of the three judges etc. filed. 4/18/entered and copies mailed.
31	Apr 23	Order fixing 5/2/74, in ct. room #7, at 10:30 A.M., for argument on Deft's. motion to dismiss, before a Three-Judge Court, filed. 4/24/74 entered and copies mailed. JG
32	Apr 24	Plff's. Memorandum in opposition to second motion to dismiss, filed.
33	Apr 25	Order amending order of 4/23/74, etc., filed. 4/26/74 entered and copies mailed. JG

Date		Proceedings
	May 2	Argued sur Govt's motion to dismiss count 111 of complaint Rosen C.J. C.A.V. JL
34	July 1	Opinion & Order Lord Ch. J & Gorbey J. that deft's. motion to dismiss is DENIED, with Dissenting Opinion & Order Rosenn Circuit Judge, filed.
35	July 25	Motion and Order extending time to and including 7/31/74 for deft to answer the Complaint, filed 7/26/74 entered and copies mailed
36	July 31	Answer filed. CASE LISTED FOR TRIAL
37	July 31	Stipulation extending time to answer & Order that the time within which to answer the complaint in this action is extended until and including the day of 7/31/74, filed. 8/1/74 entered and copied mailed. JG
38	Aug 6	Plff's Interrogatories to defts (Set No. 1), filed
39	Sept 6	Deft's answer to Plff's interrogatories, filed
	Dec 3	PRE-TRIAL CONFERENCE, Gorbey, J.
40	Dec 4	Plff's Request for Admissions (Set No. 1), filed
1975		
41	Jan 2	Deft's Response to plff's Requests for Admissions (Set No. 1), filed
42	Apr 22	Plffs' Motion to compel admissions and, or in the alternative, to compel answers to interrogatories, Memorandum in support and Notice thereof, filed
43	May 19	Govt's Motion for Protective Order and Motion in Opposition to Plff's Motion to Compel Discovery, filed

Date		Proceedings
44	May 28	Deft's Motion for Judgment on the pleadings or, alternatively, for Summary Judgment, Memorandum of Law in support and Notice thereof, filed
45	May 29	Plff's Motion to intervene Robert L. Goldberg as party Plff, filed
46	May 29	Plff's Memorandum in opposition to defts' Motion for Protective Order, filed
47	June 13	Plffs' Memorandum in Opposition to deft's Motion for Judgment on the Pleadings or, alternatively, for summary judgment, filed
(45)	June 25	ORDER that leave for Robert L. Goldberg to intervene as a party plff and to participate fully as a party plff in all proceedings and the title of this case is changed to Robert L. Goldberg et al v. Curtis Tarr etc., filed 6/26/75 entered and copies mailed JG
48	Jul 8	Plffs' Motion to Drop Certain Parties Plff, filed
(48)	Jul 22	ORDER that Andrew Rowland, Steven Rowland and David Freudberg are dropped as parties plff, filed 7/23/75 entered and copies mailed JG
49	Jul 22	ORDER DENYING plffs' motion to compel admissions and, in the alternative, to compel answers to interrogatories, filed 7/23/75 entered and copies mailed JG
50	Jul 22	ORDER that argument on the deft's motion for judgment on the pleadings or, alternatively for summary judgment, will be held before the Three-Judge Court at 10:30 A.M. on 7/31/75 in Courtroom No. 3, filed 7/23/75 entered and copies mailed JG

Date		Proceedings
51	Jul 22	ORDER that deft's motion for protective order is DENIED, filed 7/23/75 entered and copies mailed JG
52	Jul 31	ORDER that argument on deft's motion for judgment on the pleadings or alternatively, for summary judgment, scheduled for 7/31/75 at 10:30 A.M. is continued to another date etc., filed 8/1/75 entered and copies mailed JG
53	Aug 6	ORDER that argument on the deft's motion for judgment on the pleadings or, alternatively, for summary judgment, will be held before the Three-Judge Court at 3:00 P.M. on 9/17/75 in Courtroom 13-B etc., filed 8/7/75 entered and copies mailed JG
54	Oct 7	Transcript of 9/17/75, filed
55	Oct 24	ORDER DENYING defts' Motion for Judgment on the pleadings or, alternatively, for summary judgment and that the parties are to proceed with discovery in this matter so that a full record can be presented to the court before a final decision is made on the merits of this case, filed M. Rosenn, Cir. Judge Ch. J. Lord, III James H. Gorbey
56	Oct 31	Plffs' interrogatories to defts', (Set No. 1-Supplementary), filed
57	Dec 23	Stipulation and Order extending time until and including 1-31-76 for deft to answer interrogatories, filed JG
1976		
58	JAN 7	Plff's notice of taking the depositions of Peter T. Straub et al, filed
59	MAR. 9	DEPOSITION OF PETER T. STRAUB, FILED
60	Apr. 30	Report of Pretrial conference Gorbey, J., filed. 5/3/76 entered JG-CLK

Date		Proceedings
61	May 5	Plff's Motion for Sanctions, Memorandum in Support and Notice, filed
62	May 7	Defts' opposition to plff's Motion for Sanctions, Points and Authorities in Support and Certificate of Service, filed
63	May 10	Plffs' Reply Memorandum in support of Motion for Sanctions, filed
64	May 13	Defts' supplemental answers and objections to plffs' interrogatories (Set No. 1-Supplementary), filed
65	May 17	Defts' notice of taking the deposition of plff, David B. Sitman, filed (Scheduled for 6-14-76 at 2:00 P.M.)
66	May 17	Defts' notice of taking the deposition of plff, David B. Sitman, scheduled for 6-14-76 at 10:00 A.M., filed
67	May 19	Plffs' Request for Production of Documents, filed
68	May 28	Supplemental Points and authorities in support of defts' opposition to plffs' Motion for Sanctions, filed
69	May 28	Defts' notice of taking the deposition of plff, Robert L. Goldberg, filed
70	May 28	Defts' notice of taking the deposition of plff, David B. Sitman, filed
71	Jun 3	ORDER that defts' objections to plffs' interrogatories are overruled and defts are Ordered to file responsive answers to plffs' interrogatories (Set No. 1—Supplementary) or advise plffs and the court that defts adopt as their complete answers those answers which it filed on 5-31-76, within fifteen (15) days of the date of this Order, filed 6-3-76 entered and copies mailed JG
1976		
72	June 8	Defts' response to plffs' Request for Production of Documents, filed

Date		Proceedings
73	Jun 18	Defts' supplemental Response to Plffs' interrogatories (Set No. 1-Supplementary), filed
74	Jun 30	Appearance of John M. Kelson, Esq. as counsel for Defts., filed.
75	July 12	Plffs' Motion to join further defts, Memorandum in Support, Certificate of Service and Notice, filed
76	July 16	Stipulation and Order extending time to and including 7-16-76 for defts to respond to Plffs' Motion to Join Further defts, filed JG
77	July 21	Defts' Opposition to Plffs' Motion to Join Further Defts, Points and Authorities in Support and Certificate of Service, filed.
78	July 27	Stipulation and Order extending time to 7-20-76 for defts to respond to Plffs' Motion to Join Further Defts, filed JG
77	July 27	ORDER DENYING Plffs' Motion to Join Further Defts, filed 7-28-76 entered and copies mailed JG
79	Aug 25	Plffs' notice of taking the depositions of Commanding General, Robt. Gard, et al, filed
80	Sep 7	DEPOSITION OF DAVID BRUCE SITMAN, FILED
81	Sep 7	DEPOSITION OF ROBERT L. GOLDBERG, FILED
82	Sep 14	Motion for Protective Order on behalf of Maj. General Edward C. Meyer, Lt. General Harold G. Moore, John F. Ahearne, and Cpt. Joseph E. Murray, Memorandum of Points and Authorities, Certificate of Service, filed
83	Sep 15	Stipulation of counsel that the depositions scheduled for Sept. 20, Sept. 21 and

Date		Proceedings
		Oct. 12, 1976 by plffs be rescheduled etc., filed
84	Sep 15	Plffs' Opposition to Motion for Protective Order on behalf of Major General Edward C. Meyer, Lt. General Harold G. Moore, John F. Ahearne, and Cpt. Jos. E. Murray and Request for Sanctions, filed
85	Sep 17	Order that motion for protective order filed on behalf of Major General Edw. C. Meyer, etc., is DENIED, filed. entr. & cys. mailed 9/21/76 JG
1977		
86	Jan 19	DEPOSITION OF CAPT. JOS. E. MURRAY, JR., FILED
87	Mar 21	DEPOSITION OF EDWARD C. MEYER, FILED
88	Apr 14	DEPOSITION OF MAJOR GENERAL ROBERT G. GARD, JR., FILED
89	Apr 20	DEPOSITION OF JOHN F. AHEARNE, FILED
90	Jun 7	Govt's Motion for Extension of Time to and including 7/3/77 to serve defts' Renewed Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment, filed
90	July 6	ORDER that defts' motion for enlargement of time is granted and that defts' time to serve their Motion is extended to and including 7/3/77, filed 7/6/77 ENTERED & COPIES MAILED JG
91	Nov 10	ORDER reassigning this action from the calendar of Judge Gorbey to the calendar of Judge Cahn, filed 11/11/77 ENTERED; Copies mailed by chambersJG
1979		
92	Jun 6	Copy of Clerk's Notice under Local Rule 23(a), filed 6/6/79 NOTICE MAILED

Date		Proceedings
93	Jun 8	PLFF's APPLICATION FOR DISCOVERY CUTOFF AND TRIAL DATE, FILED
94	Jun 18	Plff's interrogatories to defts (Set No. 2), filed
95	Jun 29	Plffs' Memorandum in support of application for discovery cutoff and final date and contra dismissal under local rule 23, filed
96	Sept 21	Plffs' Memorandum in opposition to Motion for Protective Order, filed
97	Sept 21	Affidavit of Donald L. Weinberg, Esq. pursuant to Fed. R. Civ. Procedure 56(f), filed
98	Sept 21	MOTION OF DEFTS FOR A PROTECTIVE ORDER, POINTS AND AUTHORITIES IN SUPPORT AND CERTIFICATE OF SERVICE AND NOTICE, FILED
(98)	Sept 21	MOTION OF DEFTS FOR JUDGMENT ON THE PLEADINGS, POINTS AND AUTHORITIES IN SUPPORT, CERTIFICATE OF SERVICE AND NOTICE, FILED
99	Oct 30	ORDER DATED 10/29/79 THAT ARGUMENT ON ALL OUTSTANDING MOTIONS WILL BE HEARD IN COURTROOM 3B AT 3:00 P.M. ON 12/12/79, FILED. 10/30/79 entered & copies mailed. EC
100	Dec. 21	Appearance of William J. McGettigan, Esq., AUSA for defts., filed.
1980		
101	Jan 16	Transcript of 12/12/79, filed
102	Feb 19	MEMORANDUM CAHN, J. & ORDER THAT IN THE EVENT PLFFS WISH

Date		Proceedings
		THIS ACTION TO PROCEED AS A CLASS ACTION, THEY SHALL FILE A MOTION FOR CLASS CERTIFICATION AND A BRIEF IN SUPPORT THEREOF ON OR BEFORE 3/28/80; IF PLFFS FILE A MOTION FOR CLASS CERTIFICATION, DEFTS MAY ANSWER AND FILE A REPLY BRIEF ON OR BEFORE 4/18/80; DISCOVERY MAY PROCEED UNTIL 5/9/80 ETC.; DEFTS' MOTION FOR A PROTECTIVE ORDER IS DENIED AND TRIAL SHALL COMMENCE ON MAY 21, 1980 ETC., FILED 2/19/80 ENTERED & COPIES MAILED
103	Feb 26	Letter dtd. 2/19/80 to Judge Cahn from William J. McGettigan, Esq. re: Acknowledgment of Service of memorandum dated Feb. 19, 1980, filed
104	Feb 28	ORDER THAT DEFTS'MOTION FOR SUMMARY JUDGMENT IS DENIED AND THAT THE PROCEEDINGS SCHEDULED FOR MAY 21, 1980, WILL BEGIN AT 10:00 A.M. IN COURTROOM 3B, FILED 2/28/80 ENTERED & COPIES MAILED EC
105	Mar 7	Plffs' interrogatories to defts, Set No. 3, filed
106	Mar 7	Plffs' request for production of documents with respect to plffs' interrogatories to defts (Sets No.s 2 and 3), filed
1980		
107	Mar 19	Plffs' interrogatories to defts—Set no. 4, filed
108	Mar 20	Plffs' request for production of documents with respect to plffs' interrogatories to defts (Set No. 4), filed

Date		Proceedings
109	Mar 20	Plffs' interrogatories to deft (Set No. 5), filed
110	Mar 25	PLFFS' MOTION FOR CLASS DETERMINATION AND MEMORANDUM IN SUPPORT, FILED
111	Apr 18	Defts' opposition to plffs' Motion for Class Certification, filed
112	Apr 29	MOTION TO INTERVENE OF OWEN F. JONES AS PARTY PLFF, FILED
113	Apr 29	Reply memorandum in support of plff's Motion for Class Certification, filed
114	Apr 29	Plffs' notice of taking the depositions of Bernard D. Rostker etal, filed
115	May 5	ORDER AMENDING THE ORDER OF THIS COURT OF FEB. 19, 1980 IN THE FOLLOWING RESPECTS: DISCOVERY MAY PROCEED UP TO AND INCLUDING THE DATE OF THE FINAL HEARING OR TRIAL HEREIN ON ALL ISSUES AS SET FORTH IN PARAGRAPH 2 OF THE ORDER OF FEB. 19, 1980 ETC., FILED 5/5/80 ENTERED & COPIES MAILED EC
116	May 8	DEFTS' MOTION FOR A CONTINUANCE OF THE TRIAL DATE AND EXTENSION OF TIME WITHIN WHICH TO FILE LEGAL MEMORANDA, POINTS AND AUTHORITIES IN SUPPORT AND CERTIFICATE OF SERVICE, FILED
117	May 12	Plffs' answer to defts' motion for a continuance of the trial date and an extension of time in which to file legal memoranda and memorandum in opposition, filed

Date		Proceedings
118	May 20	Transcript of Deposition of Bernard D. Rostker, filed
119	May 20	Transcript of Deposition of Richard Danzig, filed
120	May 20	Transcript of Deposition of Robert B. Pirie, filed
121	May 20	Transcript of Deposition of Major General R. Dean Tice, filed
122	May 20	ORDER THAT THE ORDERS OF THIS COURT OF FEB. 19, 1980, AS AMENDED BY ORDER OF 5/5/80, AND OF FEB. 27, 1980 ARE FURTHER AMENDED AS FOLLOWS: DEFTS' motion for a continuance of the trial date and extension of time within which to file legal memoranda is granted; trial shall commence at 10:30 A.M. ON JULY 1, 1980 IN COURTROOM ⅜B ETC. AND THAT THE MOTION TO INTERVENE OF OWEN F. JONES AS PARTY LPLFF IS GRANTED AS UNOPPOSED. LEAVE FOR OWEN F. JONES TO INTERVENE AS PARTY PLFF HEREIN, TO JOIN THE MOTION FOR CLASS DETERMINATION FILED HEREIN AND TO PARTICIPATE FULLY AS A PARTY PLFF IN ALL PROCEEDINGS IS GRANTED EFFECTIVE THIS DAY, AND THE COMPLAINT OF INTERVENOR-PLFF OWEN F. JONES AS SET FORTH IN THE MOTION TO INTERVENE IS HEREBY ACCEPTED AS FILED AND SERVED THIS DAY, FILED (M. ROSEN, JL &E 5/20/80 ENTERED & COPIES MAILED

Date		Proceedings
123	May 20	ORDER THAT ANY MATERIALS WHICH ARE TO BE DELIVERED TO THE CHAMBERS OF THE JUDGES OF THIS COURT SHALL, WHEN DELIVERY IS INTENDED FOR CHAMBERS OF JUDGE MAX ROSENN, BE MAILED OR DELIVERED TO JUDGE ROSENN'S CHAMBERS IN WILKES-BARRE, PENNA.. IF ANY MATERIALS ARE SO VOLUMINOUS AS TO MAKE THIS IMPRACTICAL, THE PARTIES SHALL CONTACT JUDGE ROSENN TO ARRANGE DELIVERY, FILED 5/20/80 ENTERED & COPIES MAILED EC
124	Jun 4	Plffs' request for admissions (Set No. 2), filed EC
125	Jun 10	Joint Documentary and Stipulated Record (Volume No. 1), filed
126	Jun 10	Joint ocumentary and Stipulated Record (Volume No. 2), filed
127	Jun 10	Joint Documentary and Stipulated Record (Volume No. 3), filed
128	Jun 10	Joint documentary and Stipulated Record (Volume No. 4), filed
129	Jun 16	Defts' brief on The Standards for Determining Justiciability, Standing, Ripeness, Mootness, and their applicability to plffs' claims, filed
130	Jun 16	Defts' brief on the Standard of Judicial Review, filed
131	Jun 16	Defts' trial brief on plffs' claims that the Military Selective Service Act creates an unconstitutional Gender-Based Distinction, filed

Date		Proceedings
132	Jun 16	Plffs' Memorandum sur Standards and Burdens filed pursuant to Order of Feb. 19, 1980, filed
133	Jun 17	Stipulation with respect to trial testimony of intervenor plff, Robert Goldberg, filed
134	Jun 23	Plfi's' reply memorandum to defts' memoranda filed 6/16/80, filed
135	Jun 24	Defts' reply brief on Burden of Proof, filed
136	Jun 24	Defts' response to plffs' pretrial memorandum sur applicable Standard of Law and Burden of Proof governing issues of Mootness, Ripness and Standing, filed
137	Jun 24	Defts' reply brief on the standard of judicial review, filed
138	Jun 24	Defts' reply brief on class certification, filed
139	Jun 24	MOTION TO INTERVENE CARTER FAUST AND STEVEN GOLDBERG AS PARTY PLFFS, FILED
140	Jun 25	PLFFS' MOTION TO JOIN ROBERT J. LaROCCA AS PARTY PLFF AND MEMORANDUM IN SUPPORT, FILED
141	Jun 26	Plffs' designation of record—volume V, filed
142	Jun 26	Stipulation with respect to testimony of intervenor-plff Owen F. Jones, filed
143	Jun 30	Memorandum of Law in support of motion to intervene Carter Faust and Steven Goldberg as party plffs, filed
144	Jun 30	Joint Documentary and Stipulated Record, filed
145	Jun 30	Plffs' designation of stipulated record volumes I through IV, filed

Date		Proceedings
146	Jun 30	Trial Brief of plffs and intervenor plffs on the unconstitutionality of the male-only conscription statute, filed
147	Jul 2	Plffs' proposed findings of fact, filed
148	Jul 2	Plffs' Transcript of Congressional History from 1948, filed
149	Jul 2	MOTION TO JOIN BRUCE JOSEPHS AS PARTY PLFF, FILED
150	Jul 2	MOTION TO JOIN ROSS HUNTER AS PARTY PLFF, FILED
151	JUL 2	MOTION TO JOIN STEPHEN RETHERFORD AS PARTY PLFF, FILED
152	JUL 2	Affidavit of Robert J. Larocca in Support of his Motion for party plff, filed
153	Jul 14	ORDER THAT THE MOTION OF ROBERT J. LA ROCCA TO JOIN AS A PARTY PLFF IS DENIED; THE MOTION OF CARTER FAUST AND STEVEN GOLDBERG TO INTERVENE IS DENIED AND THE MOTION OF PLFTS TO HAVE THIS CASE CERTIFIED AS A CLASS ACTION IS GRANTED, IN ACCORDANCE WITH FED. R. CIV. P. 23(b)(2) A CLASS IS HEREBY CERTIFIED CONSISTING OF ALL MALE PERSONS WHO ARE REGISTERED OR SUBJECT TO REGISTRATION UNDER MALE PERSONS WHO ARE REGISTERED OR SUBJECT TO REGISTRATION UNDER 50 U.S.C. §453 OR ARE LIABLE FOR TRAINING AND SERVICE IN THE ARMED FORCES OF THE UNITED STATES ETC., FILED (Max Rosen, Circuit Judge Jos. S. Lord, III Chief

Date		Proceedings
		District Judge and Edward N. Cahn, District Judge)
154	July 15	STIPULATION AND ORDER DATED 7/15/80 THAT BERNARD ROSTKER, CURRENT DIRECTOR OF THE SELECTIVE SERVICE BE SUBSTITUTED FOR CURTIS TARR AS A DEFT IN THIS ACTION, FILED 7/15/80 ENTERED & COPIES MAILED EC
155	July 15	Letter dtd. 7/15/80 to Judges Rosenn, Lord & Cahn from Donald L. Weinberg, Esq. re: Response to the letter brief to the Court from defense counsel, dated 7/9/80 etc., filed
156	July 17	PLFTS' MOTION FOR INTERIM RELIEF AND NOTICE, FILED
157	July 18	MEMORANDUM CAHN J. AND ORDER ROSENN CIRCUIT JUDGE, LORD 111 CHIEF JUDGE AND CAHN J. THAT CLASS IS REDEFINED TO INCLUDE ALL MALE PERSONS WHO ARE REGISTERED UNDER 50 USC OR ARE LIABLE FOR TRAINING AND SERVICE IN THE ARMED FORCES OF THE U.S. AND WHO ARE ALSO EITHER SUBJECT TO REGISTRATION UNDER PRESIDENTIAL PROCLAMATION NO. 4771. THE MILITARY SELECTIVE SERVICE ACT 50 USC IS DECLARED TO BE IN VIOLATION OF THE IFTH AMENDMENT TO THE U.S. CONSTITUTION. DEFTS. ARE HEREBY PERMANENTLY ENJOINED FROM REQUIRING THE REGISTRATION UNDER THE MILITARY SELEC-

Date		Proceedings
		TIVE SERVICE ACT OF ANY MEMBER OF THE PLFF. CLAS. ETC., FILED. 7/18/80 entered & copies servied on all counsel per order of court.
158	July 18	NOTICE OF APPEAL OF THE DEFTS TO THE SUPREME COURT OF THE UNITED STATES, FILED
159	July 18	DEFTS' MOTION FOR STAY PENDING APPEAL WITH AFFIDAVIT OF JOHN P. WHITE, DEPUTY DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET, FILED (SUPREME COURT NO. 80-251)
160	July 18	Points and authorities in support of defts' motion for a stay pending appeal
161	July 18	ORDER THAT DEFTS' MOTION FOR A STAY PENDING APPEAL IS DENIED, FILED 7/18/80 ENTERED & COPIES MAILED (LORD, Chief Judge)
162	July 22	ORDER, CAHN, J. AMENDING FIRST SENTENCE OF PAGE 24 OF OPINION OF 7/18/80, FILED 7/23/80 entered and copies mailed
163	July 24	Certified copy of order Supreme Court of the U.S. that execution & enforcement of order of this court is stayed pending timely docketing of an appeal, filed.
164	July 29	ORDER DATED 7/28/80 THAT JUDGMENT IS ENTERED IN FAVOR OF PLFFS. ROBERT L. GOLDBERG, ET AL AND AGAINST THE DEFTS. BERNARD ROSTKER, ET AL, FILED. 7/30/80 entered & copies mailed. EC
165	Aug 4	Defts' List of the Court's Citations to the Revised Record, filed

Date		Proceedings
166	Aug 4	Joint documentary and Stipulated Record (Volume I), filed (REVISED)
167	Aug 4	Joint Documentary and Stipulated Record (Volume II), filed (REVISED)
168	Aug 4	Joint Documentary and Stipulated Record (Volume III), filed (REVISED)
169	Aug 4	Joint Documentary and Stipulated Record (Volume IV), filed (REVISED)
170	Aug 6	Transcript of 7/18/80 (Hearing on Govt's Application for a Stay), filed
171	Aug 7	ORDER DATED 8/6/80 AMENDING THE COURT'S OPINION OF 7/18/80 ETC., 8/7/80 ENTERED & COPIES MAILED EC
172	Sept 4	Joint Documentary and Stipulated Record (Revised) Volume V, filed
173	Oct 7	ORDER THE CLERK OF THIS COURT IS DIRECTED TO CERTIFY AND TRANSMIT TO THE CLERK OF THE SUPREME COURT OF THE U.S. THE REVISED JOINT DOCUMENTARY AND STIPULATED APPENDIX ETC., FILED.10/8/70 entered & copies mailed. EC
	Oct 9	Document Nos. 166, 167, 168, 169 and 172 transmitted to Supreme Court of The United States pursuant to Order of Court dated 10/7/80.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

v.

CURTIS TARR, ET AL., DEFENDANTS.

RESPONSES TO PLAINTIFFS' INTERROGATORIES (SET NO. 2)

I, Major General R. Dean Tice, as Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) (Military Personnel Policy), respond to plaintiffs' Second Set of Interrogatories as follows:

INTERROGATORY NO. 9: Identify all documents which, since the date of your last response to Plaintiff's Interrogatories To Defendants (Set No. 1—Supplementary), have been prepared in whole or in part by personnel of the United States Government, particularly including but without limitation military or civilian personnel of the Department of Defense and of the Armed Forces of the United States dealing in whole or in part, with the following topics:

(a) Current and projected utilization of women as military personnel by the United States;

(b) Utilization by the United States of women as military personnel in time of previous wars;

(c) Performance of women as military personnel of the United States in times of previous wars;

(d) Capability of the United States to utilize women as military personnel in peacetime and/or time of war;

(e) Current utilization of women as military personnel by any other nation(s);

(f) Utilization by other nation(s) of women as military personnel in time of war or other hostilities;

(g) Performance of women as military personnel of other nation(s) in time of war or other hostilities;

(h) Past or present conscription, or the feasibility of conscription, of women into the Armed Forces of the United States or other nation(s); or

(i) Performance as military personnel of women so conscripted, which have not heretofore been produced for inspection and copying by plaintiff.

RESPONSE: The Department of Defense maintains numerous documents pertaining to the military utilization, performance and capability of women. It is conservatively estimated that the total number of such documents located in the Office of the Secretary of Defense, the Service Headquarters, the Service Military Personnel Centers, the Service Major Field Commands, the Separate Operating Activities, and individual bases, posts, and stations would run into the thousands. The Department of Defense does not contend that the documents listed below constitute all documents which deal with the utilization of women in the military, but these comprehensive and encompassing documents provide extensive information on utilization policy and procedures. Documents (a) through (f) are attached. We are obtaining the document described in subparagraph (g) and (h) and will provide them to the plaintiffs as soon as they are available. The final study listed, *Women in the Military*, is not a DOD study. Copies can be obtained from The Brookings Institute, 1775 Massachusetts Avenue, N.W., Washington, D.C.

(a) America's Volunteers: A report on the All-Volunteer Armed Forces, December 31, 1978, Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). (Attachment 1);

(b) Use of Women in the Military, May 1977, (Second Edition—September, 1978), Office of the Assist-

ant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). (Attachment 2);

(c) Statement by Robert B. Pirie, Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics. Before the Subcommittee on Military Personnel, Committee on Armed Services, House of Representatives, Hearings on Women in the Military, November 13, 1979 (Attachment 3).

(d) Statement by Robert B. Pirie, Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics and Dr. Bernard Rosther, Director, Selective Service System before the Subcommittee on Military Personnel, Committee on Armed Services, House of Representatives, Hearings on Registration of Women, March 5, 1980. (Attachment 4).

(e) Profile, October 1979. Periodic DOD publication. (Attachment 5).

(f) Women Content in the Army REFORGER 77, 30 May 1978. U.S. Army Research Institute (Attachment 6).

(g) Evaluation of Women in the Army, March 1978, U.S. Army Administration Center.

(h) Women Content in Units Force Development Test, October 3, 1977, U.S. Army Research Institute.

INTERROGATORY NO. 10: Identify all documents which, since the date of your last response to Plaintiff's Interrogatories to Defendants (Set No. 1—Supplementary), have been prepared pursuant to any grant, commission or contract in whole or in part for use by the United States Government or its personnel, particularly including but without limitation the personnel of the Department of Defense and of the Armed Forces of the United States which relate in whole or in part to subjects listed in Interrogatory 9 and which have not been produced for inspection and copying by plaintiff.

RESPONSE: See Response to Interrogatory No. 9 and No. 13.

INTERROGATORY NO. 11: As to each document identified in response to Interrogatories 9 and 10, identify by name, rank, office address and telephone number the present custodian of the original of such document and of each copy thereof.

RESPONSE: The documents produced in response to Interrogatory Nos. 9, 10, and 13 have been in the possession of Lt. Colonel Albert H. Schroetel, USAF, who is stationed at the Pentagon. The documents identified but not produced are in the custody of the activity which prepared them.

INTERROGATORY NO. 12: Identify each military occupational specialty in the United States Army and as to each such specialty, state (a) whether women are presently eligible for the specialty, (b) the number of women presently serving in that specialty, (c) the number of women in the United States Army qualified for assignment in that specialty, (d) the number of women permitted to serve in that specialty, and (e) the total number of United States Army personnel assigned in that specialty.

RESPONSE: The information sought by this interrogatory is presently being compiled through various computer runs and will be provided to plaintiffs upon the completion of that process. It is estimated that the information will be available by April 18, 1980.

INTERROGATORY NO. 13: Identify all projects or studies carried out, in whole or in part since June 15, 1974 concerning the potential or actual utilization or performance of women in the Armed Forces, and as to each such project or study state:

(a) The name, rank, present address and telephone number of the last known person in charge of the project or study;

(b) The title, length and present location of all reports generated by or arising out of such project or study; and

(c) The person or persons for whom the project or study was or is being done.

RESPONSE: In addition to the documents listed in response to Interrogatory No. 9 and provided to the plaintiffs, the below listed studies are identified as being pertinent to this interrogatory. Again, these do not represent all studies, only those which are considered major and encompassing. These documents can be obtained by contacting Lt. Col. A.H. Schroetel, who is stationed in the Pentagon, Washington, D.C. 20301.

(a) Migrations of Women to and from Nontraditional Military Occupations, General Research Corporation, McLean, Va., July 15, 1979.

(b) Ammunition Loading and Fire Test—Pretest Physical Condition of Female Soldier Participants—(U.S. Army Human Engineering Laboratory).

(c) Intentions of Women (18–25 years old) to Join the Military: Results of a National Survey—Naval Personnel Research and Data Center (NPRDC).

(d) Pregnancy in the Navy: Impact on Absenteeism, Attrition and Workgroup Morale—(NPRDC).

(e) Project Athena III—Report of the Admission to the U.S. Military Academy—(USMA, West Point, N.Y.).

(f) Male and Female Soldiers' Beliefs about the Appropriateness of Various Jobs for Women in the Army—(Fort Benjamin Harrison, Ind.).

(g) Comparison of ASVAB test-retest results of Male and Female Enlistees—USAF Human Resources Laboratory (HRL), Brooks AFB, Texas.

(h) Characteristics of Women in the Air Force: 1970 through 1973—USAF (HRL).

(i) Utilization of Women in Industrial Career Fields—USAF (HRL).

(j) Characteristics of Air Force Accessions: Jan 1975 through Jun 1977—USAF (HRL).

(k) Air Force Female Pilots Program: Initial Performance and Attitudes—USAF (HRL).

The above answers are true and correct to the best of my knowledge.

/s/ _____

R. DEAN TICE
Major General, U.S.A.
Deputy Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics) (Military Personnel Policy)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL. PLAINTIFFS,

v.

CURTIS TARR, ET AL., DEFENDANTS.

DEFENDANTS' RESPONSE TO PLAINTIFFS' INTERROGATORIES (SET NO. 5)

I, Margaret C. Love, as attorney for defendants, respond to plaintiffs' Fifth Set of Interrogatories, as follows:

INTERROGATORY NO. 28: State all "legislative facts", if any, upon which defendants contend Congress relied or found in support of the exclusion of females from registration for conscription into the Armed Forces.

RESPONSE: The information necessary to respond to this interrogatory may be found in the following public documents:

(a) Military Selective Service Act of 1948 (62 Stat. 604);

(b) Senate Report No. 1268, 80th Cong., 2d Sess. (1948);

(c) House Report No. 1881, 80th Cong., 2d Sess. (1948);

(d) Senate Report No. 117, 82d Cong., 1st Sess. (1951);

(e) House Report No. 271, 82d Cong., 1st Sess. (1951);

(f) Conference Report No. 535, 82d Cong., 1st Sess. (1951);

(g) Senate Report No. 209, 90th Cong., 1st Sess. (1967);

(h) House Report No. 267, 90th Cong., 1st Sess. (1967);

(i) Conference Report No. 346, 90th Cong., 1st Sess. (1967);

(j) Senate Report No. 226, 96th Cong., 1st Sess. (1979);

(k) Women's Armed Services Integration Act of 1948 (62 Stat. 368);

(l) Senate Report No. 567, 80th Cong., 2d Sess. (1948);

(m) House Report No. 1616, 80th Cong., 2d Sess. (1948);

(n) Hearings Before The House Subcommittee on Organization and Mobilization, 80th Cong., 2d Sess. (1948).

INTERROGATORY NO. 29: Identify by name and last known business and residence address and telephone number all persons having knowledge of such "legislative facts" or who have supplied defendants with information concerning such legislative facts.

RESPONSE: The information requested by this interrogatory is public information which may be found in the documents described in defendants' Response to Interrogatory No. 28.

INTERROGATORY NO. 30: Identify all documents reflecting or referring to the consideration or finding by Congress of such legislative facts.

RESPONSE: *See* Response to Interrogatory No. 29.

I hereby swear under penalty or perjury that the foregoing answers are true and correct to the best of my knowledge.

Executed on: *April 24, 1980*

/s/ _____

MARGARET C. LOVE

PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM

A Report to Congress
Prepared Pursuant to
P. L. 96 - 107

February 11, 1980

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RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM

EXECUTIVE SUMMARY

On November 9, 1979, the Defense Authorization Act of 1980 (P.L. 96–107) became law. Section 811 of that Act called for the President to send to the Congress a plan for the fair and equitable reform of existing law providing for the registration and induction of persons for military service. The Congress asked for a review of ten issues that have been grouped into the following broad topics:

—Revitalizing the Selective Service System

—Induction authority

—Meeting the Armed Forces' personnel requirements

—National services

To review these issues, the Administration convened an interagency task force that examined initiatives to maintain and improve our active and reserve Armed Forces, and our capability to mobilize trained and untrained manpower in the event of a national emergency. This report presents the findings of the interagency task force.

REVITALIZING THE SELECTIVE SERVICE SYSTEM

The active and reserve forces were never intended to fight without augmentation by draftees in the event of a major national emergency. Since 1973, however, the Selective Service System (SSS) has been reduced to a planning and training organization of less than 100 full-time personnel supported by reservists. The capability of a standby SSS to process untrained manpower as part of a potential mobilization has been a source of concern. Therefore, a variety of steps are called for to enhance the Selective Service System's capability to mobilize manpower.

In his State of the Union Address on January 23, 1980, the President called for revitalizing the Selective Service System. He announced his intention to resume registration in mid-1980 for all those born in 1960 and 1961. Those

who will turn 19 during 1981 will register in January, and continuous registration of 18-year olds will also begin in January.

To register, an individual will fill out a simple form (name, address, sex, birthdate and social security number) at a local post office. After the SSS receives the form, the registrant will be sent an acknowledging receipt. No draft cards will be issued. No classification or examination of the registrant will be required.

The President would have to seek additional authority from the Congress before anyone in the pool of registrants could be inducted into the Armed Forces. He has no intention of doing so under present circumstances.

The decision to revitalize the Selective Service System and to renew registration will substantially improve the Selective Service's ability to respond. While the system will still be in "standby", there will now be an actual registration, rather than a registration contingency plan. The other components of the system will also be improved. The steps to be taken include providing the computer capacity to process data on the registrants; developing a process for recruiting and training local draft board members in the event of a mobilization; and planning a system for processing claims and appeals.

Selective Service has provided for interim computer processing adequate for registration and for any contingency that may arise. Selective Service has also developed a long term plan for a joint computer center to be shared with the Defense Department's Military Enlistment Processing Command. Registrant records within this computer center would be accessible only to authorized SSS employees. In the event of mobilization, the Emergency Military Manpower Procurement System assures an orderly process from registration through examination and classification to induction and training.

To plan for the availability of trained local boards, should mobilization ever be necessary, the SSS will work with the Governors over the next 18 months to develop a process for recruiting and training members of local

boards. The boards would thus be prepared to process claims and appeals. This would insure the equity of the process.

The local boards would have to be supported by area offices, but creating and staffing these at the time of mobilization would be extremely difficult. Hence, the plan provides that the SSS would use space in 434 military recruiting service offices at mobilization. SSS would also use computer terminals in the recruiting offices. Their staffs would be pre-trained and ready to carry out the SSS mobilization mission.

Carrying out these steps requires that the President's FY 1980 supplemental and 1981 amended budget requests for the Selective Service System be enacted.

INDUCTION AUTHORITY

Congress asked that three questions be examined concerning Presidential authority to induct people into the Armed Forces: The desirability of legislation to provide the President with induction authority in peacetime; whether there should be an Individual Ready Reserve (IRR) draft; and whether registration and conscription should extend to women.

With respect to the first question, the need for induction authority has been, and should continue to be, a matter of mutual agreement between Congress and the President. In any mobilization, the Administration would immediately submit legislation to amend the Military Selective Service Act to allow the President to begin inductions from the existing list of registrants.

The second question relates to manning our forces. The Individual Ready Reserve is a primary source at mobilization of pretrained individuals to bring forces to wartime strengths and to provide replacements for casualties.

The transition to an all-volunteer force brought longer periods of active duty for individuals, and reduced the period of reserve obligation and number of people serving in the IRR.

The FY 1981 Ready Reserve program concentrates on strengthening the Selected Reserve units so fewer Individual Ready Reservists would be needed to fill out these units in time of mobilization or war. Steps are also being taken to strengthen the IRR to correct the current shortfalls.

The appropriate mobilization manpower levels could be maintained through a voluntary system or through an IRR draft. In a peacetime situation, an IRR draft is neither necessary nor desirable and initiatives are underway to build such forces to appropriate levels without it.

The third induction authority issue the Congress has posed is whether women should be subject to registration and induction under the Military Selective Service Act. The President has decided to seek authority to register, classify and examine women for service in the Armed Forces. There are 150,000 women serving successfully in the Armed Forces today, and by 1985 it is estimated that there will be approximately 250,000 women in the Armed Forces.

However, the number of women who could fill needed job classifications in mobilization is dependent on military policy and legislative restrictions.

Under current military policy, women are not assigned to jobs involving close combat. The Secretary of Defense has stated his intent to continue that policy.

There are now also legislative restrictions involving the use of women in the Navy, Marines and Air Force. This Administration has asked Congress to remove the restrictions in order to allow the DOD discretion in deciding the best use of individuals in military service. The Administration has stated that even absent legislative restrictions we would continue a policy of not assigning women to close combat positions.

A substantial number of support jobs must be reserved for men so that they will be available if needed as close combat replacements. These factors would limit the number of women needed in the event of mobilization and

thus prevent men and women from being inducted in equal numbers. Equity can be achieved by registering both men and women and then providing that they serve in proportion to the ability of the Armed Forces to use them effectively. Conscriptions would be based upon actual military personnel needs at the time.

MEETING THE ARMED FORCES' PERSONNEL REQUIREMENTS

In a national emergency, strong, well-trained active and reserve forces are essential.

The Administration has taken several steps with respect to the active forces to insure that we maintain our strength. Over the past three years, in spite of a difficult recruiting market, enlistment of high quality volunteers has remained high, first-term attrition has declined, and retention rates at the first reenlistment point have increased. In 1979, the services achieved a personnel level of 98.5 percent of authorized active duty strength. This is in line with levels over the past five years. However, the Department of Defense remains concerned about its ability to continue recruiting enough people of high mental ability and educational attainment. This is particularly true for the Army because it fares worse than the DOD average with respect to both of these rough measures of recruit quality.

Sustaining the AVF is not only a matter of attracting new recruits. It also depends on the Services' ability to retain personnel of high quality. Reenlistments must provide for a force of experienced career military personnel in order to operate and maintain an increasingly complex force. Service members who joined the AVF in the early years are remaining beyond their initial obligation at a satisfactory rate. First-term reenlistment rates have increased substantially, from 24 percent in 1973 to 34 percent in 1979. An even greater increase in first-term retention—particularly in critical skill areas—is the keystone of our strategy to reduce the need for new recruits.

While retention of first-term personnel is encouraging, retention of career personnel is a matter of concern, especially in the Navy. To aid in recruiting and retention, the 1981 budget includes an increase of $500 million for larger enlistment and reenilstment bonuses, expanded bonus authority, improvements in pay and benefits and increased travel allowances.

As for the Ready Reserve, Selected Reserve strength increased over 19,000 during 1979, for the first net gain in total Selected Reserve strength since 1974. None of the Reserve Components declined in strength. Most of the overall strength increase was due to improved retention; however, the Naval Reserve, Army Reserve and Army National Guard experienced significant increases in new recruits. Use of full-time recruiters and other actions taken to improve both recruiting and retention are expected to produce further increases in Army Guard and Reserve strength in 1980. Continued increases in unit strengths are projected in 1981 and beyond. Emphasis is being placed on better utilization of trained personnel and on more intensive and effective unit training programs. These include proposals to allow Guard and Reserve units to participate in major training exercises and overseas tactical deployments for training.

Finally, the Individual Ready Reserve strength of the Army increased by 16 percent in 1979, and is expected to continue to grow.

NATIONAL SERVICE

The Congress required that we examine and make recommendations with respect to:

> "The desirability, in the interest of preserving discipline and morale in the Armed Forces, of establishing a national youth service program permitting volunteer work, for either public or private public service agencies, as an alternative to military service."

The four generic models examined in the report are:

—Voluntary broad-based national service

—Compulsory broad-based national service

—Voluntary targeted national service

—Compulsory lottery-based national service

We recommend against any national compulsory domestic service at this time. We note that the volunteer force is adequate to meet projected defense personnel needs; that through programs operated by ACTION, Department of Labor and other agencies, State and local governments and the private sector, opportunities for voluntary service are widely available; and that the federal government supports a substantial program of targeted employment and training opportunities for disadvantaged youth. The Administration has proposed a major expansion of these in its new youth education and employment legislation.

The compulsory lottery-based national service alternative is the most promising of the four models examined in the context of this report. It should be studied further in contingency planning for any actual military conscription in a national emergency, bearing in mind the serious practical and conceptual problems raised in this report.

PART I
REVITALIZATION OF THE SELECTIVE SERVICE SYSTEM

INTRODUCTION

As part of the debate over the future of the selective Service, the Congress, in the 1980 Defense Authorization Act, asked the President to address a number of issues pertaining to military manpower procurement policies and the appropriate posture for a "standby" Selective Service.

This part of the report addresses five of the issues posed by the Congress:

- The desirability and feasibility of resuming registration under the Military Selective Service Act;
- The desirability and feasibility of establishing a method of automatically registering persons under the Military Selective Service Act through a centralized automated system using school and other existing records, together with a discussion of the impact of such a registration on privacy rights and on other constitutional issues;
- Whether persons registered under such Act should also be immediately classified and examined or whether classification and examination of registrants should be subject to the discretion of the President;
- Such changes in the organization and operation of the Selective Service System as the President determines are necessary to enable the Selective Service System to meet the personnel requirements of the Armed Forces during a mobilization in a more efficient and expeditious manner than is presently possible; and
- Such other changes in existing law relating to registration, classification, selection and induction as the President considers appropriate.

On January 23, 1980, the President, while reiterating support for the All-Volunteer Force (AVF), called for the

revitalization of the Selective Service System and said that he would send legislative and budget proposals to the Congress "so that we can begin registration and then meet the future mobilization needs rapidly if they arise." He found: That the international situation demanded an improved United States military posture; that part of this posture was the credibility of the Selective Service to respond in an emergency; and that an operating registration system was necessary in this context. In making his decision, the President ruled out non-participatory registration and the classification and examination of registrants at this time.

BACKGROUND

Since 1973, the Armed Forces of the United States have operated under an AVF concept. The last draft calls were issued in December 1972; statutory authority to induct expired in June 1973. On April 1, 1975, the President suspended the requirement that those subject to the Military Selective Service Act (MSSA) register with the Selective Service System. Classification ended in FY 1976. Even though inductions under the MSSA have been terminated, the Selective Service System must be ready to provide the untrained manpower that will be required to staff our Armed Forces during a military emergency. The specific requirement—numbers of people and delivery schedule—are established by the Secretary of Defense. To meet this requirement Selective Service must, at a minimum, be able to start inductions within 30 days after mobilization (M+30), induct 100,000 people by no later than M+60 and accomplish 650,000 inductions within 180 days.

The ability of the Selective Service to meet this schedule has been the subject of a number of critical reviews, including a major President's Reorganization Project Study. Each study concluded, as did the then Acting Director of Selective Service in a report to the Congress (March 1979), that, Selective Service does "not presently have the capability to meet the Department of Defense wartime manpower requirements from our 'deep standby' status."

THE REVITALIZED SELECTIVE SERVICE SYSTEM

The President's decision to revitalize the Selective Service System and to initiate registration will substantially improve Selective Service's ability to respond to future emergencies. The President's decision requires that Selective Service substitute an actual registration system for a registration contingency plan and accelerate the process of improving the other components of the Selective Service System.

The *new* standby Selective Service System has five key components which together constitute the Emergency Military Manpower Procurement System (EMMPS). The components are:

- *A registration process* that is reliable and efficient.
- *An Automated Data Processing (ADP) System* that can handle Selective Service's pre- and post-mobilization requirements.
- *A system for the promulgation and distribution of orders for induction.*
- *A claims process* that can quickly insure that all registrants' rights to due process are protected.
- *A field structure* that can support the claims process.

REGISTRATION

How: The United States Postal Service (USPS) has agreed to undertake the task of face-to-face registration. The USPS is ideally suited to undertake this task because it has a single organization structure with facilities and personnel, and a communication/transportation network extending to every corner of the country. There are over 34,000 post offices and the USPS employs over 650,000 people. Postal locations are widely known. USPS has also provided similar services for the Department of State (passport applications) and for the United States Immigration and Naturalization Service (alien registration). In 1979 alone, the USPS processed over 1 million passport applications, and registered over 4 million aliens.

When: The Administration is currently developing plans and will determine in the near future exactly when registration will take place.

Who: The Congress, through the Military Selective Service Act (MSSA) has provided that males between the ages of 18 and 26 have a legal obligation to register with the Selective Service at the time and place and in the manner the President prescribes. There are approximately 16 million men who have this obligation. The President has proposed that women also register; this would raise the total to 32 million people.

When the draft was suspended in 1973, Selective Service was operating under a series of legal and regulatory reforms designed to correct the inequities of the draft during the Vietnam period. Specifically, the 1971 reforms eliminated student and occupational deferments, and instituted a national lottery. Regulatory reforms cancelled the "oldest first" policy and replaced it with the policy of year of vulnerability/youngest first, thus reducing the years of uncertainty which characterized earlier drafts. Selective Service will carry out these reforms, and will register only sufficient year of birth groups to insure that it can meet the needs of our Armed Forces.

Young men (and women when authorized by the Congress) born in 1960 and 1961 will be asked to register with Selective Service at a time the President will prescribe. In January 1981, Selective Service will ask those born in 1962 to register and, at the same time it will also initiate continuous registration of 18 year olds, i.e., young men (and women when authorized by the Congress) will register on, or about the day they turn eighteen.

If it ever becomes necessary to draft anyone, Selective Service will operate under the concept of random selection based upon year and date of birth. The first year-of-birth group from which inductees will be drawn is the one that contains those who reach age 20 in a given calendar year. Registering only those born in 1960 and 1961 will provide a sufficiently large initial pool of people to meet the needs of the Department of Defense. If it were to become neces-

sary to increase the size of the pool, Selective Service would undertake a supplemental registration of those born before 1960, who are subject to the MSSA. The size of the pool will, however, increase over-time as 18 year olds register each year and Selective Service keeps current the records of those previously registered.

Under the above plan, Selective Service will register about 8 million males and females in the near future, and 4 million more by next January. It will register about 4 million people per year thereafter.

ADP SUPPORT

In order to process the initial registration of two year of birth groups, Selective Service will make use of the keypunch capacity of the Social Security Administration (SSA) and/or the Internal Revenue Service (IRS). Both agencies have agreed to support Selective Service. The SSA advises that they could do this job using some portion of the 1,200 terminals at Wilkes Barre, Albuquerque and Salinas. The IRS has over 4,000 data entry terminals located in 10 regional centers, which are conveniently located near USPS centers. During the tax return period of January to June, the IRS has about 6,000 data entry personnel onboard. During the non-tax period of July to December, the staff is reduced to about 1,500 personnel.

The present Selective Service computer is inadequate to do the total job of managing data files, running EMMPS, and supporting area offices and the claims process. Current hardware cannot be expanded to support these tasks. In deciding how best to meet computer needs, Selective Service must make sure that any new ADP system facilitates the entire registration-to-induction process. Responsibility for this process is shared by Selective Service and the DOD's Military Enlisted Processing Command (MEPCOM). Selective Service has the responsibility to:

- Register those subject to the MSSA.
- Determine the order of those who will be called for service.

- Classify individuals.
- Order registrants to take physical and mental examinations.
- Issue orders for induction.
- Adjudicate claims for deferments, postponements, and exemptions.

The Military Enlisted Processing Command, through its 67 Armed Forces Examining and Entrance Stations (AFEES), has the responsibility to:

- Provide physical and mental examinations.
- Induct qualified registrants into the Armed Services.

To provide short-term ADP capability, Selective Service has developed a plan that will ensure (1) an immediate capability to maintain and process registration data and issue orders of induction, if necessary in a national emergency; and (2) within a year, provide for an improved interface with MEPCOM. Selective Service will immediately establish the capability to manage the registrant data file, process change of address notices, and be ready to enter the registration data into the EMMPS in the event of a military mobilization. This will be accomplished by using the facilities of a contractor. The Department of Defense has agreed to provide interim computer support for EMMPS. The compatability of the DOD computer system with EMMPS was tested and demonstrated in December 1979. DOD computer support will be provided by the U.S. Army Management Systems Support Agency (USAMSSA).

The USAMSSA computer and contractor support is only temporary. Selective Service and MEPCOM have agreed to develop a joint computer center by January 1981. A joint center has many advantages. It will reinforce the link between the two organizations, e.g., in the event of mobilization the volume of data transmitted each day would be substantial and a joint facility would minimize delays and the need for an expensive telecommunications network. It would put Selective Service on a computer

solely dedicated to the military manpower procurement mission, and would help insure the coordination of manpower flows into the AFEES. The computer center will have sufficient data input capacity to handle Selective Service requirements for continuous registration and data file update (change of address). It will also have the ability to support local boards upon mobilization through 434 area offices which would be established. Computer terminals in each area office will be linked to the central computer and would be used to enter and update claims information.

The joint MEPCOM/SSS Computer Center will adhere to DOD and SSS policy that procedures and safeguards must be developed to insure that access to registrant data files of the SSS is in accordance with existing law.

PROMULGATION OF ORDERS FOR INDUCTION.

In the event of a call for inductions, there will be a single national draft call based upon random selection as provided for in the Emergency Military Manpower Procurement System (EMMPS). Actual induction orders will be issued by the Director of Selective Service, by direction of the President and under authority of Section 5(d) of the MSSA. Using the Selective Service master registration file, induction orders, in Random Sequence Number (RSN) order (based on the lottery), will be transmitted as Western Union Mailgrams. The Mailgrams will contain the following information:

- Identification of the inductee.
- Orders to report at a specific time to a designated AFEES.
- Information on procedures to follow if unable to comply with the induction order.
- Information on exemption and deferment rights.
- A simple claim for exemption or deferment form.
- The address of the inductee's local board/area office to which claims should be sent.

The area office, upon recept of a claim, will notify Selective Service Headquarters and will process the claim ac-

cording to standard Selective Service procedures. MEPCOM will also be notified of individuals ordered to AFEES and will report their status to Selective Service Headquarters.

CLAIMS PROCESSING AND THE SELECTIVE SERVICE FIELD STRUCTURE.

Under EMMPS, after receiving an order for induction a registrant may apply for a deferment or exemption. It has historically been, and will continue to be, the task of local draft boards supported by Selective Service Area Offices to adjudicate such claims. It is imperative that a claims structure be in place when orders for inducation are issued. Therefore plans and procedures are being developed for the selection and training of local and appeal board members. The FY 1980 Supplemental Budget contains funds for Headquarter's staff to initiate the process. The actual selection and training of members is funded in the FY 1981 Budget.

Selective Service also has streamlined its procedures to reconstitute essential area offices in support of local boards. The Secretary of Defense and the Director of Selective Service have agreed that, "in order to facilitate the operation of the Selective Service in support of the manpower procurement needs of the Department of Defense, we must better coordinate our planning and post-mobilization manpower system. In addition, it is appropriate that DOD, like other Federal agencies, provide support to the Selective Service during a national emergency. Such support from DOD might include but not be limited to computer and data processing, selected personnel, and facilities. However, DOD should not in any way be involved in the process by which the Selective Service adjudicates claims for deferment or exemption."

Selective Service has a cadre of 715 military reservists to reactivate the administrative field structure upon mobilization. Selective Service has entered into an agreement with DOD to use specific Armed Forces Recruiting Office facilities within 24 hours after mobilization. Re-

cruiting Service personnel will augment the Selective Service reservists for about 45 days after mobilization. These personnel will be identified by name, provided training and will participate in training exercises and field tests.

Also, Selective Service has restructured its reserve officer summer training to test its ability to mobilize State Headquarters and reestablish area offices. Selective Service reserve officers will visit the Armed Forces Recruiting Offices scheduled to support Selective Service during a mobilization. Equipment and personnel in these offices will be inventoried and local contacts with GSA, OPM, and the telephone company will be made. In addition, Selective Service will fully participate in the Department of Defense mobilization exercise planned for this fall.

CALENDAR OF EVENTS IN THE EVENT OF A MILITARY MOBILIZATION.

The mission of the Selective Service is to be ready, without notice, to provide the untrained personnel that will be required to staff our Armed Forces during a military emergency.

The President's action to reinstate registration does not change this mission. As previously noted, all that has happened is that the Selective Service will be substituting an operating registration system for a registration contingency plan. In the event of a national emergency and the reinstitution of the draft, the Selective Service, operating under EMMPS, will initiate the following process:

Time	*Events*
Pre-Mobilization	Individuals subject to the MSSA and in specific age groups register with Selective Service at local post offices.
M	The President declares a national emergency and asks Congress for the authority to induct.

Time	*Events*
M+1	Congress authorizes the President to induct personnel into the Armed Forces.
	The Selective Service conducts a lottery and establishes the "order-of-call" based on Random Sequence Number (RSN).
	The Director of Selective Service pursuant to regulations issued by the President under Section 5(d) of the Military Selective Service Act (MSSA) issues orders for induction in the proper RSN "order-of-call."
	Selective Service area offices open under an established agreement with the Department of Defense to make available selected recruiting command facilities and personnel.
M+2 to M+12	Registrants receive orders for induction and can: —report to an AFEES for processing, receive a physical and mental examination, and if found fit, be inducted.
	or
	—request an exemption or deferment.
	A registrant may request reclassification by filing a claim with an area office of the Selective Service.
M+13	First inductees report to their assigned military training bases.
M+28	The system, working at maximum capacity, processes the 100,000th inductee.
	(Analysis shows that the AFEES

Time	*Events*
	could perform at least 14,000 physical and mental examinations based on two shifts each day. The AFEES plan to operate six days per week, in the event of mobilization. Based upon an historical 50 percent physical and mental examination acceptance rate, the system could induct 7,000 per day, six days per week.)

STANDBY SELECTIVE SERVICE SYSTEM

The 1980 Defense Authorization Act required the President to consider:

- Non-participatory (computer-match) registration.
- Pre-mobilization registration.
- Pre-mobilization registration with classification.
- Pre-mobilization registration with classification and examination.

The previous discussion contained a detailed description of plans to revitalize the standby Selective Service System by initiating pre-mobilization registration and upgrading other components of the system. The following describes the other options:

Non-Participatory Registration. The Congressional Budget Office (CBO) and the General Accounting Office (GAO) proposed that Selective Service consider relying on existing computer files to create a list of draft eligibles instead of planning on a traditional face-to-face registration. This proposal was evaluated in terms of (1) Selective Service's ability to construct a list of sufficient size and accuracy from which to induct the required personnel, and (2) the impact of such procedures on the Privacy Act, on other related statutes, on the MSSA, and on Constitutional questions of equal protection and due process.

The Selective Service, in order to carry out the draft, needs the name, address, and birth date of males subject

to the MSSA. (If females are subject to the MSSA, it would also need to know the sex of the registrant.) At a minimum, it needs valid data (e.g. correct addresses) on sufficient numbers of people to insure that it can induct the required number of people; a 5:1 order to induct/induction ratio is anticipated and used for planning. A master list must be available no later than M+20 to insure that Selective Service can deliver the first inductees to Defense by M+30.

The most comprehensive data base available is the master Social Security Administration (SSA) file which contains all the needed data except current address. Based upon Selective Service's survey of five Federal agencies (Agriculture, HEW, Justice, Commerce, and Treasury); and the Education, Motor Vehicle and Voter Registration agencies in six states, it found the most comprehensive source of "current" addresses is the Internal Revenue Service (IRS).

The Congressional Budget Office, using Department of Labor employment statistics, has estimated that 85 percent of the 19-to-20 year old population work some time during each year, and therefore file an Income Tax Return. The Bureau of the Census reports that the mobility rate of the prime age group (18–26) ranged from 16 to 34 percent during the period 1975 to 1976. Selective Service's best estimate is that, unless a master list is updated regularly, approximately 25 percent of the addresses will be invalid by the end of the year. A merged SSA/IRS list will be most accurate immediately after April 15, and will become progressively inaccurate until the following year's filing. Given Selective Service estimates of an 85 percent IRS coverage and a 25 percent mobility rate, a master list with "valid" addresses may capture as little as 60 percent of the draft eligible population.

As noted, any registration system must be able to provide a list in about twenty days. CBO indicates that these agencies "already have a major tape exchange program in effect, and they estimate it would take about three to five days to merge the files . . ." However, in response to in-

quiries from Selective Service, Social Security indicated it would take a month to deliver the data, and IRS indicated two months to perform the match and create the merge file. It appears that in order to insure a master file, SSA and IRS data would have to be merged in the pre-mobilization period.

While the construction of a master list from SSA and IRS computer files is feasible, questions have been raised on privacy and constitutional guarantees of equal protection and due process. All Federal agencies surveyed advised that not only would the Privacy Act of 1974 have to be amended, but prohibitions on individual agencies would also have to be changed. (IRS has specific prohibitions in Title 26.) Moreover, IRS believes that, "to use the Internal Revenue Service system for the purpose suggested would adversely affect our extremely important mission in a number of ways. It may have a significant impact on compliance in the area of withholdings and return filings . . . if withholding records are used in the military induction process, draft protestors would be presented with an irresistible temptation to become tax protestors."

Non-participatory registration would require an amendment to the MSSA, and such an amendment would raises questions of due process and equal protection guarantees of the Constitution.

Under present mobilization plans, not everyone eligible to serve is likely to be called. A system in which induction into military service would be confined to those who have social security numbers, have filed an Income Tax Return, and have not moved, does not appear to be an equitable means for determining eligibility for military service This is particularly true since there are other ways open to the Congress—face-to-face registration—which guarantee the process under the law.

It is often argued that face-to-face registration will not provide more names and addresses than non-participatory registration, and, therefore, the two systems are equivalent. This does not appear to be correct. Selective Service estimates that a face-to-face registration will provide a list

over 98 percent complete compared to as little as 60 percent by means of computer merger. More importantly, as long as everyone is given a fair opportunity to register, 100 percent of the population eligible for military service under the MSSA will be legally accounted for, i.e., those who do not register may be in violation of the law.

Non-participatory registration also may violate standards of equal protection because two people who are identical, except that one recently moved, would be treated differently in terms of the probability they would have to serve. The administration of such a scheme would thus produce disparity of treatment of persons similar in all legally recognized ways.

Pre-Mobilization Registration with Classification. If pre-mobilization classification as well as registration was in effect, the Selective Service would modify its Emergency Military Manpower Procurement System (EMMPS) procedures. SSS would establish 434 area offices to support the classification workload of local draft boards. At the same time, 97 appeal boards would be established. Registrants would be given continuous opportunity to appeal or petition for change of classification.

Pre-mobilization classification of registrants would not improve mobilization response times. First inductions would still occur at M+12. One hundred thousand inductions would be made by M+28 and 630,000 by M+119. The benefit of classification before mobilization would not be in response time, but in a more orderly induction process, since orders would be issued only to those already classified. However, individuals who did not request reclassification in the pre-mobilization period might still do so during mobilization.

The additional costs incurred by reinstating pre-mobilization classification would be determined in part by the numbers classified.*

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*The costs presented here are programmatic estimates and have not been developed in sufficient detail to serve as budget estimates. The costs would be in addition to those required to reinstate registration.

Two sub-options were considered: (1) classify only enough registrants to insure the delivery of 100,000 qualified inductees, and (2) classify an entire year of birth group annually.

In order to provide 100,000 qualified inductees, Selective Service would classify approximately 500,000 registrants. Additional staff would be needed to handle classification questionnaires, make and maintain registrant files, request additional documentation when required, decide administrative reclassifications, support local boards, update data bases, notify registrants of results, arrange for personal appearances, and respond to queries.

If an entire year group (about 4 million men and women) is classified each year, added costs would approximately double, but with no increase in responsiveness.

Pre-Mobilization Classification and Examination. Under this concept, registrants with specified classifications would be ordered to an AFEES for pre-induction examination. Those found acceptable would be available for induction after a check of physical status. Army regulations provide that physical examinations are valid for one year. If an individual is inducted within a year after his examination, only a physical inspection is required. A delay of more than a year would call for a new examination.

Responsiveness would be improved because MEPCOM would be able to process pre-examined individuals more quickly. Current estimates are that MEPCOM could accept up to 17,500 pre-examined individuals per day and that about 16,000 of these (92 percent) would be found acceptable and inducted versus current processing estimates of 7,000 pre-registered but unexamined inductees.

As with pre-mobilization classification, two sub-options are: (1) examine sufficient numbers of classified registrants to insure 100,000 qualified inductees and (2) examine an entire year of birth group annually. In either case, induction orders would be issued on M+1, and inductions would begin at M+12, initially at a rate of 16,000 per day. If a portion of a year group is examined, 100,000 qualified

males could be inducted by M+16 and 650,000 individuals could be inducted by M+108. If the entire year group is examined in the pre-mobilization period, then the total 650,000 inductions could be made by M+56. Thus, both sub-options exceed DOD's stated requirements for inductees.

If a decision is made to examine only enough people to meet DOD's 60-day requirement, Selective Service would plan to order over 400,000 registrants for examination. Additional Selective Service resources would be added to process examination results, schedule transportation for the registrants to take examinations, answer queries, and schedule the additional workloads for local boards. One-time costs would increase in either case since additional area offices would need to be operational. The additional Selective Service recurring costs would total $10 million if part of a year group is examined and $50 million if an entire year group is examined annually.

The costs of the examination would be borne by the Department of the Army. The Office of the Army Deputy Chief of Staff for Personnel provided an estimate of $75.00 per examination based on the expected use of contract physicians. Re-examinations would cost about $10.00. Using these projected costs, examining part of a year group would cost about $30 million and examining an entire year group would cost over $200 million.

CONCLUSIONS AND RECOMMENDATIONS

Analysis of non-participatory registration suggests that while as a procedure it is technically feasible, it is not likely to be perceived as fair or equitable and would be subject to serious Constitutional challenge. For these reasons, the non-participatory registration concept has not been adopted.

With the President's decision to create a registrant data base and revitalize the SSS, classification or examination are not necessary at this time. The reduced delivery time provided by the other options is unnecessary at this time

and does not warrant the significant additional costs. This decision is always subject to review in light of the changing needs of the Armed Forces and the international situation.

PART II
INDUCTION AUTHORITY ISSUES

INTRODUCTION

This set of issues concerns the authority of the President to register, classify, examine and induct persons into the active Armed Forces and the Individual Ready Reserve. Specifically, the Congress has asked for a response on:

- The desirability of the enactment of authority for the President to induct persons registered under the Military Selective Service Act for training and service in the Armed Forces during any period with respect to which the President determines that such authority is required in the interest of the national defense.
- Whether women should be subject to registration under the Military Selective Service Act and to induction for training and service in the Armed Forces under such Act.
- The desirability and feasibility of providing authority for the President to induct persons into the Individual Ready Reserve.

Those issues are reviewed and conclusions and recommendations are presented in the following sections.

STANDBY PRESIDENTIAL INDUCTION AUTHORITY

Background

The draft was instituted during the Civil War and World War I by Acts of Congress, and Congress authorized use of the draft by the President beginning one year prior to U.S. involvement in World War II. This authority continued through World War II. After World War II, Congress allowed the draft law to expire for a brief period, but reinstated conscription during the Berlin airlift of 1948. For the following 25 years, the Congress delegated to the President the authority to determine when to initiate inductions. The 1948 law provided an induction authority for

a two-year period. The authority was extended for one year in 1950. Beginning in 1951, the induction authority was extended by Congress to the President for successive four-year periods. However, in 1971, the Congress, at the request of the Administration, extended the President's induction authority for only two years. The purpose of the Administration's request for only a two-year extension in 1971 was to allow time to phase into an All-Volunteer force.

The last call for inductees was issued by the Selective Service System in December 1972. On January 27, 1973, the Secretary of Defense announced the implementation of a "zero draft." The Nixon Administration did not request an extension of the President's induction authority in 1973. Congress allowed the authority to expire on July 1, 1973.

Other provisions of the Military Selective Service Act, including Presidential authority to register and classify young men, remained in effect.

Discussion and Conclusion

The following alternatives were reviewed:

- Provide authority for the President to induct persons if the President determines that such induction is required in the interest of national defense.
- Provide Presidential authority to begin induction upon Presidential declaration of a national emergency or Congressional declaration of national emergency or war.
- Continue with current arrangement; i.e., where Congress must enact the authority to induct.

The Military Selective Service Act presently authorizes the President to reinstate registration and classification but prohibits inductions without Congressional approval. The Administration supports the requirement for Congressional approval. In a nation where individual freedom is cherished, the decision to institute conscription is a serious matter and should be a shared responsibility of the Congress and the President. The Administration would

request the authority to conscript if this step were deemed necessary by the President.

However, sufficient time should exist after mobilization is announced for Congress to authorize induction by amending the current Military Selective Service Act (50 U.S.C. App. 451, *et seq*). The Administration does not seek additional statutory authority to induct.

REGISTRATION AND INDUCTION OF WOMEN

Background

Current Statutory Authority. The statutory authority for the draft expired in June 1973, ending a nearly continuous period of over 30 years of compulsory service for men. The current Military Selective Service Act provides standby authority to the President for the reinstitution of registration and classification for service in the Armed Services for young men between the ages of 18 and 26. There is no provision for the registration and classification of women. The President does not have authority to reinstate inductions for men or to induct women.

Women in the Service. The influx of women into the military during this decade has provided substantial evidence that women are capable of high quality performance in many military skills. The number of women in the military service has increased from 39,000 in 1969 to over 150,000 in 1979. They represent about 8 percent of the force and are projected to represent approximately 12 percent by 1985.

Current Laws and Policy. The Secretary of Defense and the Secretaries of the Military Departments set policy for the assignment of women within statutory restrictions imposed by Congress. The Department of Defense has asked that the statutory restrictions be removed. Repeal is needed to provide the Service Secretaries with greater flexibility in determining assignments. Current assignment policies are described below:

Army. Within the Army, there are no statutory restrictions on the assignment of women. The Secretary

of the Army determines where women may serve and, in conjunction with the Chief of Staff, develops policies and programs to employ Army women effectively. Current Army policy excludes women, both officer and enlisted, from those specialties and units which relate to close combat (infantry, armor, cannon field artillery, combat engineer and low altitude air defense units of battalion/squadron or smaller size). Women are assigned to combat support and combat service support units in divisions, including maintenance battalions, signal battalions, brigade level headquarters and certain artillery units.

Navy. For the Navy, Title 10 U.S.C. 6015, as amended, prohibits the assignment of women to permanent duty on vessels and aircraft that are engaged in combat missions. Female officers may be assigned to positions within all unrestricted line career fields, except submarine warfare and special warfare. These two specialties remain closed to women because of their close relationship to combat. Enlisted women in the Navy have access to 86 of the 100 ratings. The fourteen ratings excluded contain skills found primarily on combatant ships.

Air Force. Female officers in the Air Force may serve in all officer career fields but are excluded from some specific positions due to the provision in 10 U.S.C. 8549 that restricts women from being assigned to air crew positions on combat aircraft engaged in combat missions (primarily fighters, bombers, reconnaissance and tactical aircraft). Only four of 230 Air Force enlisted occupations are closed to women. These exclusions are due to either the legislative restrictions in Title 10 U.S.C. 8549 or Air Force policy.

Marine Corps. By policy the Marine Corps, like the Army, does not assign women to units whose primary mission is one of combat nor does it assign women to those military occupations which are primarily associated with combat units. Marines in the Fleet Ma-

rine Force must be frequently rotated from land duty to sea duty aboard combat vessels. Women are precluded by law from serving aboard these vessels. Sufficient billets must be set aside ashore for men assigned to these positions to provide for an equitable rotation policy. Therefore, no occupational field is allowed to have more women assigned than can support the established rotational policy of overseas tours for men. Moreover, no unit of the Fleet Marine Force is allowed to contain more than 10 percent women.

Discussion

The following alternatives were considered:

- Women should be exempt from Selective Service registration and induction into the Armed Forces.
- Women should be subject to registration and induction. However, the rate of induction of women should be based on the needs of the Armed Forces.
- Women should be subject to registration and induction for training and service in the Armed Forces in equal numbers with men.

Three arguments have been advanced for changing the law to allow women to be drafted:

- Women can perform well in skills and jobs needed by the military.
- The Armed Forces may need a female draft to meet total wartime personnel requirements.
- It is inequitable to limit the burden of compulsory service to males.

Job Performance by Women. Today over 8 percent of military personnel are women. Women have won promotions to the grade of Brigadier General, Rear Admiral, Major General, and numerous other leadership positions. Women are today performing well a wide variety of jobs in each of the services. A large number of military jobs are ones which women are also performing daily in civilian life.

The Military Requirements for Drafting Women. If the Military Selective Service Act is amended to provide for the registration and classification of both men and women, the pool of people available to be drafted would be doubled.

It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men (ages 18 to 26) is sufficiently large to meet projected wartime requirements. Furthermore, men, unlike women, can be assigned to any military position, including those combat jobs.

However, women can be used in large numbers in the peacetime and wartime force. Their presence could free more men for close combat jobs. The maximum number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as close combat roles, for men only and (3) the need to reserve a substantial number of noncombat positions for men in order to provide a pool of ready replacements for close combat positions.

A change in the Selective Service Act to permit the registration and induction of women would not necessarily mean that significant numbers of women would be drafted. If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the military forces subject to the three constraints discussed above, and to the needs of the Armed Forces to provide close combat fillers and replacements quickly. If there were not enough women volunteers to bring total female strength up to that number, a draft call for women would be issued.

The Issue of Equity. The argument has been advanced that it would be inequitable to impose registration and induction only on males. This is a persuasive argument. Since women have proven that they can serve successfully in the Armed Forces in peace they should be asked also to serve in the Armed Forces during a national emergency or

war to the extent that they can make a contribution. It is possible, however, that women would not be conscripted—even for those positions to which they are assigned under present policy—if volunteering provides as many women as could be used.

The equity argument does not require that men and women be inducted in equal numbers. The numbers for each would have to reflect the jobs available for each to fill.

Equity is achieved when both men and women are asked to serve in porportion to the ability of the Armed Forces to use them effectively.

Conclusion

In order to expand the potential personnel pool available during a national emergency, women as well as men should be subject by law to registration, induction and training for service in the Armed Forces. Women should constitute a part of the personnel inventory from which the Services could draw to meet requirements as needed. The utilization of women would be determined in accordance with the needs and mission of each Service.

Recommendations

The Military Selective Service Act (50 U.S.C. App. 451, *et seq*) should be amended to provide Presidential authority to register, classify and examine women for service in the Armed Forces. At such time as Congress authorizes the conscription of men, authority should also be extended to provide for the conscription of women.

INDUCTION INTO THE INDIVIDUAL READY RESERVE (IRR)

Background

In assessing its need for mobilization manpower, the Department of Defense has determined that the most demanding situation would be an outbreak of intense conflict

between the Warsaw Pact and NATO nations preceded by very little warning time. Under this condition, there would be an abrupt rise in personnel needed to bring units up to wartime strength and to replace casualties.

To meet this "worst-case" wartime requirement, the Department of Defense must rely not only on the active forces and the Selected Reserve but also on personnel trained before mobilization is declared. This pretrained personnel pool must be sized to meet military manpower requirements until a wartime draft can be activated and inductees trained. If a period of rising tensions precedes an outbreak of war, and if during that period a decision to resume induction and increase the size of the active force is made, a smaller pretrained manpower pool would be needed. Planning for this less demanding circumstance is subsumed under planning for the "worst case."

The Individual Ready Reserve (IRR) is the primary but not the sole pool of pretrained individuals. The IRR comprises the portion of the Ready Reserve strength consisting of trained personnel not organized into units. Its purpose is to provide in an emergency, trained individuals to bring active and Selected Reserve units from their peacetime to their wartime strength and to provide replacements for combat casualties in the first few months of mobilization.

Individuals who have completed their tour of duty with the active or Reserve Component forces but still have time remaining on their six-year military service obligation are transferred to the IRR and are subject to call in an emergency. The IRR also contains volunteers, both officers and enlisted personnel, who have extended beyond their statutory obligation. However, its size is primarily a function of the number of people leaving active and selected reserve service and the period of time remaining in their obligation.

The IRR can be ordered to active duty upon a declaration of national emergency by the President or the Congress or upon a declaration of war by the Congress. It has declined in strength from its average 890,000 in the 1960's

and its peak of 1,600,000 in 1971 to a low of 354,000 in early 1978. The decline was due primarily to a contraction in the size of the active force, and therefore in the number of obligated individuals leaving active duty. Secondarily, it reflects longer average enlistments in the volunteer era. In 1978 and the first three quarters of 1979, the IRR grew by 12 percent to a September 30, 1979 level of 396,000. The programs that have caused that increase and promise further strength increases will be addressed later.

The IRR has been regarded by some as the only source for supplementing active and reserve units with pretrained individuals. Clearly this is not so. There are other important sources of pretrained individuals, including the Standby Reserve and retired military personnel.

At current levels, the IRR and other sources of personnel are inadequate to meet the Army's "worst case" needs for pretrained personnel. If such a situation were to develop, a shortage of 200,000 to 300,000 trained personnel for the Army would likely develop in the first few months.

Peacetime induction directly into the IRR has been suggested as a means of overcoming this shortfall. Such a step would require new legislation and increased appropriations for pay and allowances for trainees, training base operations, and the costs of processing people through the draft mechanism.

Discussion

The following alternatives were considered:

- Provide the authority for the President in peacetime to induct persons into the active forces for training and then transfer them to the IRR after completion of training.
- Do not induct persons into the IRR but rebuild the IRR with voluntary programs.

These alternatives represent dramatically different choices. The sections that follow present arguments for and against an IRR draft as well as describing and evaluating the volunteer alternative to the draft.

The IRR Draft

There are two major advantages to an IRR draft:

- It would eliminate the present Army shortfall in pretrained manpower in about two and a half years after implementation.*
- To the extent that some of the IRR draftees would want to join an active or reserve unit after training, an IRR draft would help active force and Selected Reserve recruiting.

The major disadvantages lie in the social and dollar costs of an IRR draft and the relatively marginal value of IRR draftees as compared with other trained soldiers.

- A recent Defense Department study estimated the cost of an IRR draft to be in excess of $500 million annually.[1]
- IRR draftees would, by definition, suffer from lack of unit experience. Their skills would severely erode over their five and one-half year military obligation following training. (Present IRR members typically are in this category for only one or two years after having served in units.) Their short term of active service (probably six months) would be expected to influence adversely their acquisition of skills, their retention of skills over the next five and one-half years and their yield rates if mobilized. Some of these adverse effects could be reduced if the draft process included a requirement for addi-

*Assuming 100,000 draftees per year with 20,000 choosing the active force or Selected Reserve in lieu of remaining in the IRR after training. (The Army training base can only accommodate about 80,000 people annually in addition to those programmed.) After two years, the number drafted would likely be less. The exact number would depend on the extent to which draftees opted to volunteer for the active force or the Selected Reserve after training.

tional training two or three times during the five and one-half year period of obligation. This would, however, increase the cost, hardship, and opposition to such a draft.

The Volunteer Alternative

The main alternative to the IRR draft is to enhance the volunteer program for both the IRR and the Selected Reserve. Enlistment and reenlistment in either of these components of the Ready Reserve will help resolve the Army's mobilization manpower shortfall because fewer IRR personnel would be needed at time of war to bring the Selected Reserve up to wartime strength. Thus, a better manned Selected Reserve reduces the need for IRR personnel.

The following sections of this paper present:

- The FY 1981 programs to increase IRR strength and to manage that pool better.
- The major elements of the FY 1981 programs to improve Selected Reserve strength.
- The measures being taken to make better use of members of the standby reserve and retired personnel.

Increases in IRR Strength

The Department of Defense is currently enhancing its volunteer program to increase the size of the IRR and to manage it better. These initiatives are described below:

- All individuals leaving the Army from active duty and the Selected Reserve prior to the end of their enlistment are being screened to insure that only those with no mobilization potential are discharged. The remainder are transferred to the IRR. By this technique, the Army estimates about 80,000 people can be added to the IRR by 1985.
- Each of the Services has an IRR reenlistment program underway to encourage members reaching the

end of their six-year service obligation to reenlist in the IRR. The need for a reenlistment bonus for the Army is apparent. Consequently, legislation has been prepared and will be submitted to authorize the payment of a reenlistment bonus for the IRR. The FY 1981 budget request includes funds for this program. It is estimated that, the program would increase the Army IRR by about 30,000.

- Women enlistees now receive the same six-year military service obligation as their male counterparts. This legislative change will begin to show results in 1981.
- DOD no longer allows enlistees to count the time spent after enlistment, but before they entered service for initial training, toward fulfillment of the six-year military service obligation. This will increase the Army IRR by 14,000.
- The legal provision that exempted enlistees 26 years of age or over from incurring the six-year military service obligation was eliminated in 1979. Currently, all enlistees incur a six-year obligation. The Army will experience a 10,000 person increase in the IRR by 1985 as a result of this change.
- The active forces' test of two-year active duty enlistments and the Selected Reserve's use of three and four year enlistments will also increase the strength of the IRR.

  The shorter periods of time spent in the active forces or the Selected Reserve means a longer period in the IRR in order to fulfill the six-year obligation. The test for the Army for one year is expected to add about 1,000 members to the IRR, but for FY 1981 only.
- In 1979, the Army tested an IRR direct enlistment program in which non-prior service persons were allowed to enlist directly into the IRR and, after successfully completing training, were given the option of transferring to the active Army, the

Selected Reserve or remaining in the IRR. About 30 percent went into the active Army and 15 percent into the Selected Reserve. Based on these initial results, the IRR direct enlistment option is being expanded to most of the country and provisions for voluntary refresher training are being developed. This program is expected to provide additional accessions into the IRR and to serve also as another source of accessions for the active force and the Selected Reserve.

- As Army members leave the active forces and are transferred to the IRR, they are being matched with mobilization assignments and given orders telling them where to report upon mobilization. This will greatly speed the reporting of IRR members when they are needed.

These programs are designed to make the IRR pool more responsive to a mobilization call and to increase it in size for DOD as a whole from 396,000 at end-FY 1979 to 540,000 by end-FY 1981 and 680,000 by end-FY 1985. The projected increases in Army IRR strength for the programs discussed are shown in the following table.

Projected Army IRR Strength Increases from FY 1979
(000's)

Program	End FY 1981	End FY 1985
Screen Discharges	30	80
IRR Reenlistment Bonus	15	30
MSO for Women	3	25
Elimination of Time in DEP	-	14
Age 26 MSO Policy	-	10
TOTAL	48	159

The expected increase of 159,000 Army IRR members will not be sufficient to eliminate the shortfall mentioned earlier. Consequently, increases in the strength of the Selected Reserve will be needed also to insure that wartime manpower requirements can be met.

Selected Reserve Strength Increases

The programs to increase Selected Reserve strength are in four major areas:

- Varied enlistment options are now being offered in the Selected Reserve. New accessions may enlist for four or five years in the Selected Reserve with the balance of the six year obligation in the IRR. These options are in addition to the standard six-year enlistment.
- More flexibility to individuals in scheduling their initial periods of training. In the past, all new accessions were required to serve a minimum of 12 consecutive weeks during which they received basic military training and their specialty training. Split-training is now offered which permits enlistees to take basic military training and specialty training in two separate sessions; e.g., two consecutive summers.
- Enlistment and reenlistment bonuses as well as educational benefits are now being offered. These incentive programs are designed to attract and retain people in Selected Reserve units scheduled to deploy in time of war. These programs have been in effect since December 1978.
- A full-time Army Reserve recruiting force under the control of the Army's Recruiting Command is now in operation. It features a centralized referral system, an automated system for accession management and recognition of outstanding performance by individual recruiters. This management program reversed the decline in Army Reserve strength.

Besides further growth from these programs in the years ahead, we are now planning substantial efforts to reduce reserve attrition. Lower attrition will lead to increased strength, even without more enlistments.

Together the increases in IRR and Selected Reserve strength are expected to eliminate the Army's shortfall of pretrained manpower by the mid 1980's.

Other Management Actions

In addition to the programs for increasing the strength and better managing the IRR and Selected Reserve, we are improving the responsiveness and utility of the retiree and Standby Reserve pools of trained individuals:

- Members of the Standby Reserve are being screened to determine their mobilization potential and those with valuable skills are being asked to transfer to the IRR. The frequency of contact with the members is being increased in order to validate home address, physical status and other important data.
- All the Services have programs underway to identify positions that can be filled upon mobilization by retired personnel. Efforts are also underway to identify retirees and pre-assign them to specific mobilization positions. Retired personnel represent a valuable and experienced resource and could replace active duty personnel in the training and support establishments upon mobilization.

Conclusion

- The programs underway for increased manning in the IRR and Selected Reserve should eliminate the shortfall by 1985.
- A draft would not solve the IRR program much sooner than the improvements contained in the current program. Current Army training base expansion capabilities would limit the amount of accessions to about 80,000 people annually. Therefore, it would take an IRR draft at least two and one-half years to fill the shortfall.

PART III
OTHER PROCEDURES TO IMPROVE THE ARMED FORCES

INTRODUCTION

The Congress asked the President to identify procedures that could be established to enable the Armed Forces to meet their personnel requirements. The following sections review our progress in meeting personnel objectives and cite improvements that the Administration has underway and under consideration.

BACKGROUND

The main personnel requirement of the Department of Defense is to provide enough qualified people to maintain military preparedness. Military preparedness depends on three groups of people in differing states of readiness: the Active Forces provide trained and equipped personnel organized into units and able to deploy immediately; the Reserve Components, which are organized in units and in pools of obligated and trained personnel, provide the first stage in the expansion of effective forces; the civilian population represents unobligated and typically untrained manpower resources available for the second stage of expansion of forces in the event of a severe threat to the nation's security.

In peacetime, the Active Forces and Reserve Components depend entirely on volunteers. Their level of manning is a consequence of recruiting success, attrition experience and reenlistment rates.

ACTIVE FORCE

Overview

A decade ago the President's Commission on an All-Volunteer Force set as the main objective of the AVF to meet active force military manpower end strength requirements without conscription. By that objective, the AVF has been very successful. As shown on the following

table, since FY 1974 the active forces have remained within 1.5 percent of the Congressionally authorized strength levels. Insofar as strength levels have declined, it is by choice, not because of recruiting problems.

ALL-VOLUNTEER FORCE DATA: ACTIVE FORCES

	Fiscal Year						1st Qtr.	
	1973	1974	1975	1977	1978	1979	1979	1980
End Strength (000)								
Planned	2,288	2,174	2,129	2,088	2,069	2,050	2,038	2,016
Actual	2,252	2,161	2,127	2,074	2,061	2,024	2,040	2,019
% Achieved	98.4	99.5	99.9	99.3	99.6	98.7	100.1	100.1
Accessions								
Total (000)	485	423	458	411	332	338	65	84
% of Objective	96	97	102	98	98	93	90	96
NPS Accessions	455 a/	395	419	388	312	316	60	78
High School Graduates (000)	301	233	277	269	240	229	43	45
% of NPS Accessions	66	61	66	69	77	73	71	58
Reenlistment Rates (%)								
First Term	24	30	37	35	37	37	38	40
Career	83	81	82	75	72	68	71	71
Total	47	52	57	54	55	53	55	56
First Term Attrition (%) b/	32	37	35	35c/	30c/	28c/—		

a/ Includes 206,000 inductees for 1970 and 36,000 for 1973.

b/ Percent of those who enlisted for three or more years in fiscal year shown who left will leave before completing three years of service.

c/ Projections based on data through FY 1979.

Recruitment

The above table also shows that FY 1979 was the most difficult recruiting year under the AVF. The Services achieved only 93 percent of their collective recruiting objective. For the first time under the AVF, all four Services were short of objectives. Still, 338,000 young men and women enlisted in the Armed Forces in 1979. That was 6,000 more than the previous year. (The Services achieved 98 percent of their goal in 1978 because the objective was lower than in 1979.) In FY 1979, over 73 percent of new accessions had high school diplomas—a percentage that is higher than any year in history except for 1978. However, the Department of Defense remains concerned about its ability and educational attainment. The Army especially is

of concern, since it falls below the DOD average with respect to both of these rough measures of recruit quality.

Although the recruiting results for the first quarter of FY 1980 fell short of the overall DOD objective, they show a significant improvement over the same period during FY 1979. During this period the Services recruited 96 percent of their objectives as compared to 90 percent for the first quarter of FY 1979. This is encouraging because the objective for the first quarter of FY 1980 (88,200) was 16,300 higher than for the first quarter of FY 1979 (71,900) because of the need to make up recruiting shortfalls carried forward from FY 1979.

The demographic projections for the coming decade raise concerns. During this period the pool of eligible 18 year old men and women will decline by about 20 percent from the 1979 level of 4.2 million. No one can predict with confidence how much these downward trends will affect recruitment for the All-Volunteer Force.

Attrition

First-term attrition increased dramatically with the advent of volunteerism. The All-Volunteer Force Commission had projected a drop in attrition as conscripts passed from the system. Instead, the Service policies were liberalized. Discharge of poor performers was more common than it had been under the draft. To some extent, this was a healthy change, but the losses are expensive in terms of recruiting and training costs. Actions initiated in 1977 have begun to cut such losses, as shown on the table above.

Reenlistment

First-term reenlistment rates have remained near 37 percent since 1975. The current rate is over 2.5 times the FY 1970 rate. This larger than predicted retention of trained personnel has significantly reduced the requirement for new accessions and is a major success of the AVF, contributing to increased readiness.

On the other hand, reenlistment rates at the second and later reenlistment points have dropped steadily from the high of 83 percent in 1973 to 68 percent in FY 1978, well below the 1970 rate. To some extent, this is attributable to the higher first-term reenlistment rate. Many of those who reenlisted to receive the Selective Reenlistment Bonus and other incentives are faced with perceived pay cuts when considering reenlistment decisions without bonuses beyond ten years of service. While overall retention is encouraging, career reenlistment is of concern, especially in the Navy.

SELECTED RESERVE

The Selected Reserve also provides an important part of the All-Volunteer Force. The following table shows recent Selected Reserve trends.

ALL-VOLUNTEER FORCE DATA: SELECTED RESERVE

	Fiscal Years					
	1973	1974	1975	1977	1978	1979
Average Strength (000)a/						
Planned	917	904	914	835	809	798
Actual	927	912	905	813	796	808
Accessions						
Total (000)	189	226	219	225	201	205
As % of Objective	-	-	-	98	85	94
NPS Accessions (000)	70	46	69	73	70	78
Male High School Graduates	-	19	27	25	22	26
Continuation Rates (%) b/						
First Term	-	-	76	65	66	73
Career	-	-	81	81	81	81
Total	-	-	77	72	74	78

a/ Congress authorizes the average strength of the Selected Reserve, in contrast to the end-year.

b/ % of numbers continuing from one year to the next.

In FY 1978 the Reserve Components experienced a low point in manning. This continued a decline from FY 1974. The decline was reversed in FY 1979. The average strength of the Selected Reserve is expected to continue

to increase from 808,000 in FY 1979 to 850,000 in FY 1981. These increases are expected to result from a stable recruiting force, incentives, and increased retention accomplished through better training. All other indicators in the table showed an increase in FY 1979.

HELPING THE MILITARY MEET ITS PERSONNEL REQUIREMENTS

The AVF is not without problems, but it is working, in many respects better than anticipated ten years ago. The problems are important, however. The key problems in military recruiting seem to result from a decline in the value of the enlistment package, an unfavorable image of the military, and an improved economy. The Armed Forces entered the All-Volunteer Force with a competitive "enlistment package" that was successful. That package consisted of:

- substantial increases in pay;
- career pay competitive with the private sector;
- a strong educational incentive in the "'GI Bill;" and
- highly valued in-service benefits for the serviceperson and his/her family.

Over the past six years, the attractiveness of that package, particularly to high potential high school graduates, has diminished. The basic pay for grade E–2 has declined relative to pay in the private sector. Increases in career military pay, along with increases in Federal civilian pay, have lagged behind increases in pay in the private sector. Further, the significant increases in the cost of living have eroded the real income of all Americans. In addition, the contributory Veterans Education Assistance Program (VEAP) is not as attractive as the former GI Bill, and some in-service benefits have been reduced.

There are improvements that would help the military meet its personnel requirements:

- Make military service more attractive to the potential enlistee and to those in service by improving pay and benefits.

- Reduce the need to recruit young men by recruiting more women and by reducing the attrition of both men and women already in service.
- Improve the capability to add trained people to the force after mobilization by training draftees faster and by increasing the size of the pool of trained people.

The president's Budget proposes actions in all of these areas.

Improving pay and Benefits

The President's FY 1981 budget proposes increases of $133 million over the bonus levels paid in FY 1979, including legislative requests for increases in the maximum bonus payments permitted and an extension of bonuses beyond the current ten years of service limit.

Also, there are a series of proposals pending before Congress, or soon to be submitted, which we believe are needed to make military pay and benefits more attractive. Some of these proposals are discussed below:

- Legislation has been proposed to make the non-disability retirement system more responsive to the needs of members and military management requirements. Under this initiative, existing inequities are corrected, uniformity is established among the Services, new entitlements are provided for members, and savings are realized, in the future, that may be spent on other aspects of compensation or elsewhere in the budget.
- Currently, a family separation allowance accrues only to service members with dependents who are in grade E–4 and above with more than four years service. Legislation is pending to extend this benefit to junior enlisted members.
- To ensure that pay levels are adequate to attract and retain physicians, the Administration has proposed a restructuring of existing special pays and a new retention bonus for critical specialities.

- A legislative proposal to revise the method of computing sea pay was enacted last year. A provision of the bill required a transition period of several years. The Administration has now proposed that the new rates be paid immediately rather than at the originally specified future date.
- A restructuring, both in form and amount, of the reimbursement for moving expenses that now exceed out-of-pocket costs for military members. The President's budget adds $122 million in FY 1981 for this purpose.
- An Administration pay reform proposal that if enacted would result in higher raises in FY 1981 for military members than for general schedule Civil Service employees.
- At present, unmarried senior enlisted personnel can be required to live in barracks. Legislation will be proposed to give these senior personnel the choice between living in barracks or receiving a quarters allowance.
- The budget includes $102 million dollars to increase the reimbursement to military members when they are traveling on official business.
- Current law provides for forgiveness of some portion of a student loan for persons serving on active duty in combat. The House of Representatives has passed and the Administration supports changes to the Higher Education Act that would forgive a portion of student loans for active or reserve enlisted service.

Finally, the House Armed Services Committee has asked the Department of Defense for a report on the feasibility of a more generous educational incentives program to attract potential recruits. However, the Department's report, is more comprehensive. It reviews all current incentives, makes recommendations regarding modifications to existing programs, discusses possible new in-

centives that may be necessary, summarizes data on the AVF through FY 1979 and presents Service comments. This report will soon be submitted to the Congress.

Reducing the Need to Recruit Young Men

The Department of Defense has made plans to utilize more effectively the personnel resources available. Two of the more important aspects of these plans are:

Reducing the first-term attrition. The Services are reducing the number of individuals who are lost to the military during their first three years, prior to completing their initial enlistment. By keeping volunteers longer, fewer volunteers are needed. First-term attrition is now 28 percent, down from 37 percent in 1974. The Services are more thoroughly screening those who enter the force, and are increasing management attention to reducing attrition. Continued attention should keep first-term attrition at, or perhaps somewhat below, current levels.

Increasing use of Women. All Services project continued large increases in female volunteers during the next several years. Women represent the major, underutilized personnel resource for the military. Prior to 1973, women provided less than 2 percent of the total Defense enlisted strength. Under the All-Volunteer Force, the percentage grew rapidly. It is about 8 percent now, and is programmed to reach approximately 12 percent by 1985. By 1985, one out of every six Air Force enlisted members will be female. The role of women has also changed. While women do not serve in infantry, armor, cannon artillery or combat engineer units of battalion size or smaller in the Army, they are serving in combat support units throughout the service. About 95 percent of the skills in the armed forces are open to women. Women are now being assigned to some ships and aircraft crews, within the limits established by 10 U.S.C. 6015 and 8549.

Improving the Capability to Add Trained People to the Force After Mobilization

There are many programs and initiatives within the De-

partment of Defense to make trained people available more quickly and in larger numbers following a decision to mobilize. Many of these are discussed in the section of this report on the feasibility of Presidential induction authority for the Individual Ready Reserve (IRR). Three improvements under consideration in the Department of Defense for which Congressional authorization would be required before implementation are described below:

Reenlistment Bonus for the IRR The 1981 Budget proposes legislation that would authorize the payment of a bonus for service in the Individual Ready Reserve (IRR). This would be offered to individuals who have completed their statutory or contractual military service obligation. This bonus would be directed towards individuals who have military occupational skills, such as infantry, armor, artillery and combat medics, that are critically needed in the IRR. Recipients would incur a three year service obligation for the bonus, now anticipated to be $600. The program is designed to increase the Army IRR by more than 30,000 members by 1985.

Selective Service Screening of Members of the Standby Reserve. Legislation has been submitted to delete the provisions in 10 U.S.C. 672 which provide that members of the Standby Reserve must be screened by the Selective Service System and declared available for military duty before the Department of Defense can recall them in a mobilization. The Standby Reserve is the only category of military personnel that cannot be mobilized directly by the Department of Defense. Members of the Standby Reserve, including physicians, may be needed quickly to meet manpower requirements in the early days of a mobilization and should be processed independently of the Selective Service System. This change would also relieve the Selective Service System of a responsibility that is peripheral to its primary job: to be prepared to classify and deliver non-prior service personnel to the Department of Defense for examination and induction.

Extension of the Military Service Obligation. One way to increase the size of the Individual Ready Reserve (IRR) would be to make the current six-year military service obligation longer. For example, individuals who serve in the active force for a period of four years are currently transferred to the IRR for the remaining two years of their statutory six-year obligation. If the obligation were extended by a year, they would spend a third year in the IRR.

A one-year extension would increase IRR strength by about 85,000 for the Army, where the need is greatest. This increase would not occur, however, until six years after the law was changed.

A longer obligation would be a disincentive to enlistment. It is not without precedent, however. Between 1951 and 1958, the nation had an eight-year military service obligation. A proposal to lengthen the obligation is being evaluated by the Department of Defense.

CONCLUSION

The All-Volunteer Force has served the nation well since its inception. There is every reason to believe it can continue to do so in the future if the Congress provides the enhancements to military pay and benefits proposed by the Administration.

AMERICA'S VOLUNTEERS

A Report on the ALL - VOLUNTEER ARMED FORCES

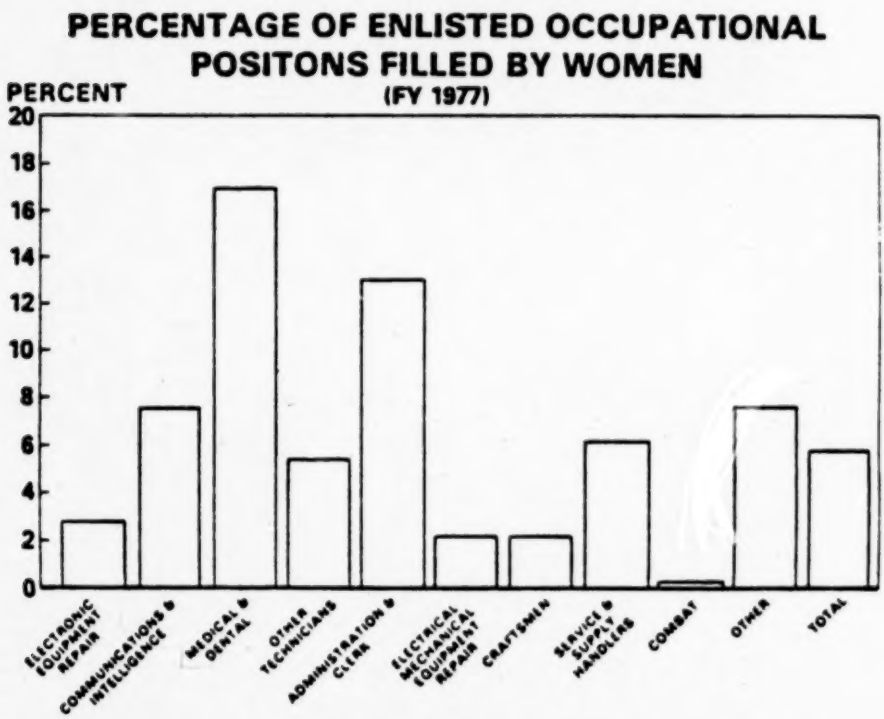
DECEMBER 31, 1979

OFFICE OF THE ASSISTANT
SECRETARY OF DEFENSE
(MANPOWER, RESERVE AFFAIRS
AND LOGISTICS)

Increased Role of Women

Women are now serving in military skills previously closed to them. Figure 3–8 shows the percentage of enlisted positions by occupation which are filled by women. Since the total force was 5.8% female, any percentage above that level indicates higher than average concentration of women and percentages lower than 5.8% indicate underrepresentation. The greatest density of women is in traditional skills, the medical/dental and administration/clerical occupations.

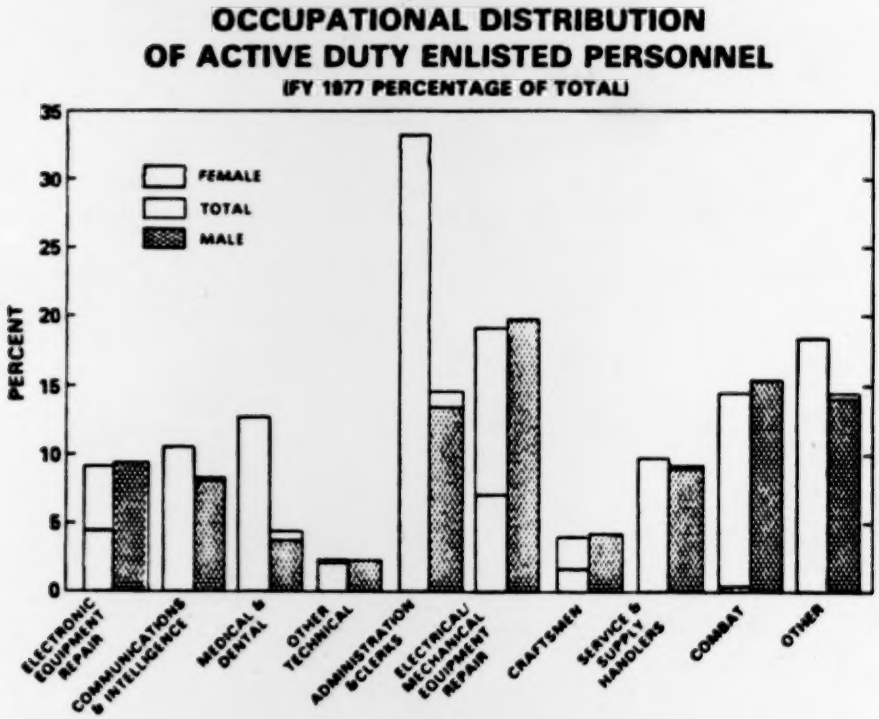
Figure 3-8



While Figure 3–8 considered positions filled by women as a percentage of all the positions in each occupational area, Figure 3–9 shows the distribution of enlisted men and women by occupation. That is, Figure 3–8 shows what percentage of all the enlisted women is in each occupation as compared to the distribution for men. Of all enlisted women on active duty at the end of FY 1977, 33% were in

administrative and clerical positions as compared to 13% for men. Women also had a much higher percentage in medical/dental (13%) when compared to men (4%). Women have much lower percentages than men in electronic equipment repair, crafts and, of course, combat skills.

Figure 3-9

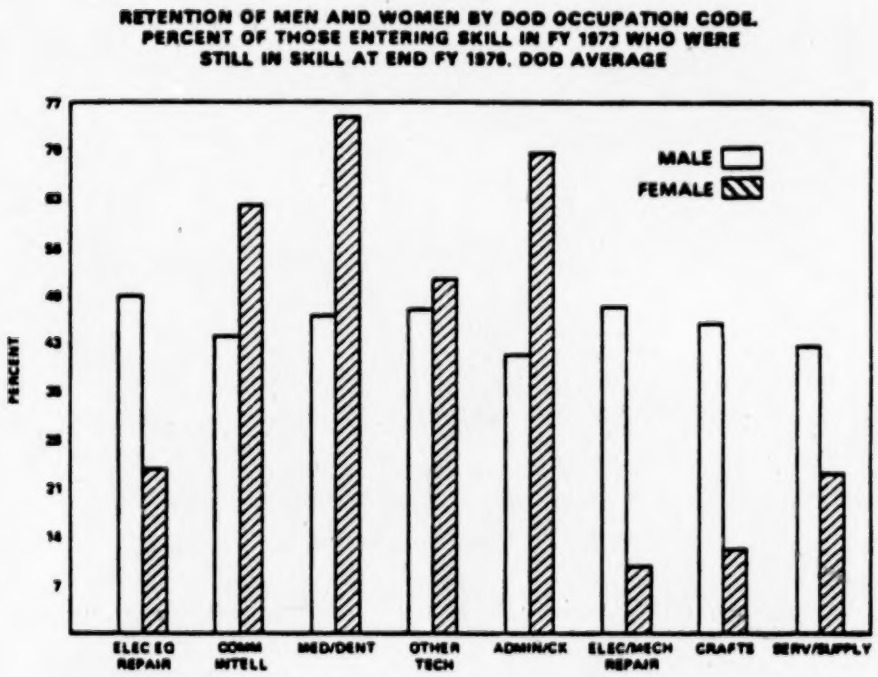


Taking Figures 3-8 and 3-9 together, one sees that 33% of the women serve in administrative and clerical positions, but that they represent only 13% of the total positions in the occupation. While only 4% of men serve in administrative and clerical positions, they fill 87% of those positions. Even in the traditional occupations there is room for growth in the numbers of women.

Current analysis indicates a potential to increase the number of women in the military even further—in part because more women want to enlist than are now accepted. But too rapid a rate of growth can result in an imbalance of women in the junior ranks because it takes

years for recruits to be trained and promoted into positions as qualified supervisors. Moreover, DoD cannot be certain how many women will be attracted to traditionally non-female occupations, nor if they will reenlist in those occupations in sufficient numbers to meet career force requirements. For example, retention by DoD occupation code for men and women is shown in Figure 3-10. Enlisted women had much higher retention in traditional skills than men, but much lower in non-traditional skills.

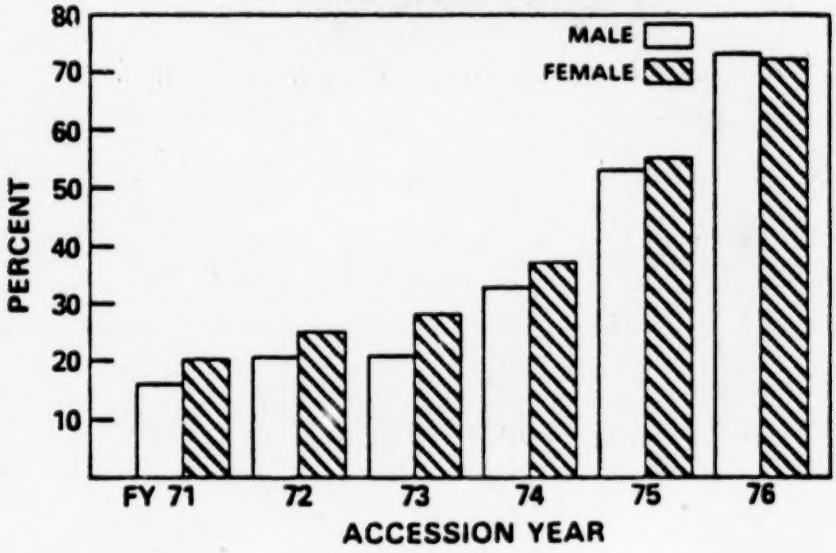
Figure 3-10



While Figure 3-10 showed comparative retention of men and women who enlisted in FY 1973 by occupation, Figure 3-11 compares the average retention of six cohort groups. Women, on average, are retained as well as men. Taking Figures 3-10 and 3-11 together, one concludes that women are retained at higher rates than men in skills more traditionally identified with women and at lower rates in the non-traditional skills such as electrical equipment repair,

Figure 3-11

PERCENT OF FY 1971-1976 MALE AND FEMALE ACCESSIONS ON ACTIVE DUTY AS OF END FY 1977



technical, mechanical repair and crafts, but that these differences average out. One could argue that the Services should concentrate on recruiting men and women into the skills where they have the best retention prospects, but such a policy would have some questionable equal opportunity implications. In recent years, the Services have been striving to increase the numbers of women in nontraditional occupations.

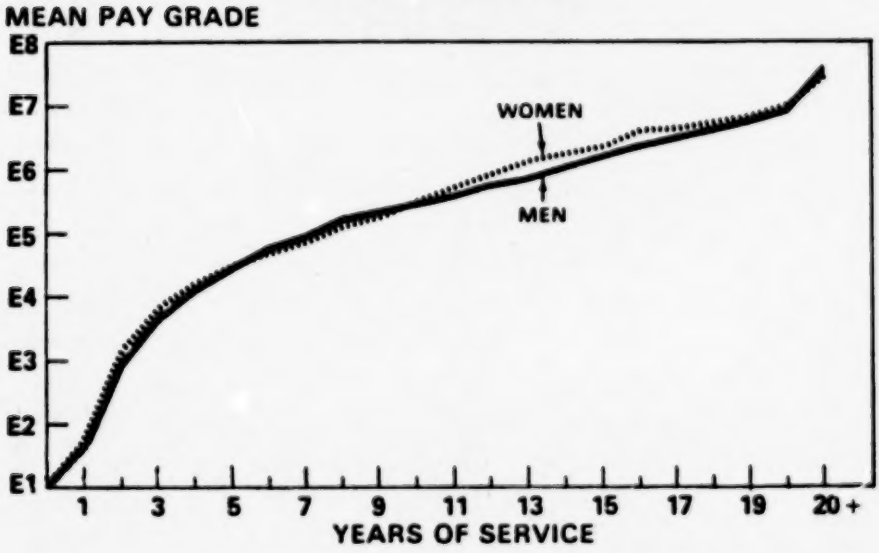
Comparative Promotion Experience

On average, men and women who enlist in the same year have about the same promotion history, as shown in Figure 3-12. Men and women who enlisted in a given year, on average, had achieved about the same grade level at the end of FY 1977. However, the rapidly increasing percentages of women in the force in recent years (see Figure 3-7) mean that in absolute numbers there are many more junior

women than senior women. This fact is often observed in the field and has led to a number of concerned inquiries about the promotion of enlisted women. Table 3-12 confirms that enlisted women are being promoted as well as their male cohorts.

Figure 3-12

DOD AVERAGE PAY GRADE FOR ENLISTED MEN AND WOMEN BY YEAR OF SERVICE
(AS OF END FY 1977)



Women in Combat

As the number of women in the military increases, women are beginning to enter, in greater numbers, job fields that have been traditionally held only by men. Many of these are in the combat environment. While women are not assigned to positions requiring close combat on a regular basis, numerous jobs related to combat can be efficiently and effectively filled by women. Army nurses, although legally classified as noncombatant, have served in the combat environment for more than a century. Women have received combat decorations, such as the Bronze Star and Purple Heart. Presently, there are no combat restric-

tions in law on the assignment of women in the Army. The Secretary of the Army is authorized to determine where Army women may serve. His policies and programs are developed, reviewed, and modified as national attitudes and circumstances change. Recently, the Army has opened all but the most hazardous and arduous positions to women.

The current Army policy states: "Women are authorized to serve in any officer or enlisted specialty, except some selected specialties, in any organizational level and in any unit of the Army except infantry, armor, cannon field artillery, combat engineer, and low altitude air defense artillery units of battalion/squadron or smaller size."[6]

This means that women may be assigned to brigade level headquarters, Hawk and Hercules Missile Air Defense Units, missile and field artillery elements such as Lance units, signal battalions and wheel and track vehicle maintenance battalions. They can fly the new Blackhawk helicopter in nondirect combat roles and now some positions in the elite units such as the 82d and 101st Airborne Divisions are open to women. Policy, however, restricts them from serving in an attack or scout role.

An Army message of September 8, 1977, gave the following guidance to Army field commanders: "Women will be trained to defend themselves individually as well as participate in the unit defense of combat support and combat service support units and should be employed by unit commanders in the same manner as male soldiers . . . Unit commanders are authorized to employ women to accomplish unit missions throughout the battlefield . . . . Women are not excluded from performance of mission duty forward of the brigade rear boundary "Soldiers will not be excused from the performance of unit duties solely on the basis of gender."[7]

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[6]Deputy Chief of Staff for Personnel Memorandum for DAPE-MPE-SS, 7 Dec 77.

[7]HQ DA message, DAPE-MPE-C5, Washington, D.C., R082058z, 8 Sept 77.

From these directives, it is clear that women soldiers are an important and integral part of the Army. They will be expected to pull their share of the workload in the combat environment as do men in the same MOS, but will not be assigned to certain of the most arduous combat units or skills.

These changes in Army policy are not whims, but are based on an extensive study. One such study is called "Women Content in the Army (WITA)". As part of WITA, in 1976, the Army conducted major tests on the impact of female participation in company size units. Units were tested in three-day field exercises with from 0% to 35% women. The results of those tests (called MAXWAC) showed no degradation in unit performance as a result of female content.[8] A second part of WITA was conducted in 1977. During the major NATO exercise, REFORGER-77 conducted in the fall of 1977, the effect of women in units on sustained operations was tested. This test, called REFWAC[9], reconfirmed the MAXWAC results. Women soldiers can and do perform well in combat support units in the field as well as in garrison. There is no significant difference in the performance of these kinds of units. Such trends as did exist showed that, if anything, the integrated units did better, especially when the number of women were above the token level and the men and women were well trained.

In the Navy, the issue of women is somewhat different from the Army. Until this year, Section 6015 of Chapter 10 USC precludes women from serving on Navy ships, stating, " . . . women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospi-

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[8]*Women Content in Units Force Development Test (MAXWAC)*, U.S. Army Research Institute for the Behavioral and Social Sciences, October 1977.

[9]*Women Content in the Army-Reforger 77*, U.S. Army Research Institute for the Behavioral and Social Sciences, 15 March 1978.

tal ships and transports."[10] Congress has passed language modifying section 6015. Under the new amendment, women will be allowed to serve full-time on hospital and transport ships and other such vessels not expected to be assigned combat missions. Also, they may serve up to six months temporary duty on other Navy vessels.

As Secretary of the Navy testified, the Navy is beginning to assign women to permanent duty on some ships. Women on temporary duty assigned to combat ships do not replace men. In case a vessel, with women on board, is assigned to a combat mission, every effort would be made to disembark the women but not in such a way as to interfere with the accomplishment of the mission. In the Navy, women still may not serve on vessels or aircraft engaged in combat missions.

A similar legal restraint exists for the Air Force. "Female members of the Air Force, except those designated under section 8067 of this title, or appointed with a view to designation under that section, may not be assigned to duty in aircraft engaged in combat mission."[11] This law does not pose any serious problems to the Air Force in reaching their female recruiting objectives. The Department of Defense has called for the repeal of both 10 USC 8549 and 6015. They are neither necessary nor appropriate. Appendix H contains correspondence on this matter.

Expanding the roles of women and the number of women in the force broadens the recruiting base for Armed Forces. As shown by recent experiences of the Army, women are demonstrating that they are capable of playing an even larger part in national defense. Repealing the two laws mentioned above will be a significant step forward in opening the military Services to those American women who want to serve and will reduce the effect of

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[10] USC 6015, 10 August 1956, C.1041, 70A Stat 375 (See Appendix H).

[11] USC 8549, 10 August 1956, C/1041, 70A Stat 528 (See Appendix H).

the declining youth population on military recuiting under an AVF.

Additional Management Flexibility

The initiatives already taken to date should more than match the reduction in recruit supply occurring in the 1980s. Nevertheless, the future remains full of uncertainties and additional flexibility is needed to cover unforeseen situations. DoD has identified a number of other management initatives that could assist in meeting AVF recruiting targets. Some of the most promising are discussed in the following sections.

SUBJECTIVE CRITICISMS IN PERSPECTIVE

LCDR John R. Thompson and CDR Richard W. Hunter

BACKGROUND

The body of this report has dealt primarily with issues that could be quantified. However, in the discussion that has taken place in recent years concerning the AVF, many issues have been raised that are subjective in nature and either are not readily subject to statistical comparisons or require judgments beyond the data itself.

In a study prepared for Senator Sam Nunn in 1977, William R. King expressed concern about the AVF with regard to a number of issues of this nature.[1] In several articles, Charles C. Moskos and others have discussed facets of the AVF that defy quantification.[2]

The ABC Television Network presented a documentary special on April 20, 1978, titled, "ABC NEWS CLOSEUP . . . The American Army: A Shocking State of Readiness" that raised numerous issues of the same type.[3] Representative Robin Beard (R. Tenn.) sponsored a study by Jerry L. Reed that was, in part, critical of the volunteer Army and dealt almost exclusively in highly subjective opinions and perceptions.[4] During testimony before the Manpower Subcommittee of the Senate Armed Services Committee on June 20, 1978, a variety of witnesses critized or defended the AVF.[5] Again, much of the discus-

sion was concerned with aspects of the AVF that are not easily described by statistical measures.

Congressman Les Aspin (D. Wisconsin) addressed the House of Representatives on the subject of the AVF on August 4, 1978.[6] He presented a considerable amount of quantified data on the subject; but, he too contributed to the dialogue on the more subjective concerns.

ISSUES

The subjective issues generally fall into one of five categories: the quality of the individuals entering the force, the morale of the force, the readiness of the force, patriotism in the armed forces, or the impact of the AVF on society at large. Each category is discussed in more detail in the following sections.

Quality of Volunteers

Perceived Problems

The quality of the individuals enlisting under the AVF has been cited often as a shortcoming of the volunteer Army. The critics assert that the volunteer Army is less capable than its draft period predecessor. The data shows changes in both directions, as discussed in Chapter 2. The effect of the increase in mental category III-B personnel and the decrease in category I to III-A accessions must be balanced against greatly reduced number of category IV people taken into the military under the AVF. The critics of the AVF tend to concentrate on the reductions in upper quality personnel, while the defendants of the AVF concentrate on the reductions in lowest quality personnel.[7] The decline in the number of accessions with college experience has also been cited as evidence that the quality of the volunteers is below that of the draft period accessions.[8] Reading skills have been reported to be on the decline even among high school graduates and the AVF is implicitly blamed for this phenomenon.[9] Today's volunteers were described by an Army junior officer in testimony before Congress to be immature and to have diffi-

culty retaining basic knowledge and, in some instances, to be unable to communicate in English.[10] Some critics assert that the increasing role of women, which they attribute to the AVF, has weakened the force. (Many women do have difficulty in performing some of the physical tasks required by some military specialties.)[11] These alleged quality deficits have been said to be magnified by the increasing complexity of modern weaponry.

Discussion of Quality Problems

These quality centered criticisms do not bear up under close scrutiny. The most significant change in the mental quality of recruits under the AVF has been the sharp decline in mental category IV personnel (down 63% from 1964) as discussed in Chapter 2. These individuals have historically accounted for a disproportionate share of disciplinary and training problems. The slight decrease in category I and II personnel (down 8% since 1964) has had much less impact. For the Army, the decline in mental group IV is 54% and for mental groups I and II is 26%. This 26% is of some concern. The Air Force has actually had an increase in mental groups I and II, such that more than half of their accessions are in these categories. While mental group I and II individuals, who represent the top 35% of the nation's youth, are needed in some specialties, most specialties can be filled with average people and many specialties can be filled very effectively with less gifted persons. Representative Les Aspin (D. Wisconsin) has even argued that the Services are taking too few low mental category personnel.[12] The same is true with respect to the decline in college experienced accessions since the Vietnam years. The military certainly can benefit from these more educated people, but few enlisted military positions require college training. In many cases, a college educated recruit would probably consider himself to be overqualified for the tasks assigned. In time of war, the percentage of college youth among accessions has historically increased as the military dipped further into the manpower pool. While Chapter 2 showed that today's en-

listed force contains more college educated personnel than did the pre-Vietnam peacetime force and that the percentage is increasing under the AVF, the number of accessions with college experience is lower than during the peacetime draft.

The reading skill problem has been recognized by the Department of Defense. Despite maintaining the percentage of recruits with a high school diploma, there has been an increasing perception that many recruits are unable to adequately understand training manuals and other written material. The extent of the problem is difficult to quantify. However, the Services are developing an adaptation of the standard entrance examination which will specifically measure reading and writing skills. This problem is not unique to, nor caused by, the AVF. It is the result of changing educational performance in society and probably would be exacerbated by a return to conscription with the associated increase of personnel in the lower mental groups.

With respect to the ability of women to meet the physical demands of military service, even the highly critical Beard Report found that the young male soldiers interviewed tended to be complimentary of the job performance of female soldiers and the *Women Content in the Army* study found that units with women performed as well as all male units.[13] The Services are developing realistic physical standards for the various military occupations to ensure that people who do not meet the standards, male or female, are not assigned to them. This is a much better solution to the female strength issue than gender-wide prohibitions on assignments.

Weapon systems have become steadily more complex, but technology also has provided modular maintenance techniques that tend to simplify the maintenance and repair of the systems. Any disparity between the capabilities of today's recruit and the complexity of his weapons should be solved by improvements in weapon designs that more realistically assess operating and maintenance personnel capabilities and reflect greater concern for the

human factor. As Representative Les Aspin pointed out, a return to the lower quality standards under a draft would only intensify these problems of over-complex systems:

> "There are frequent reports from the field saying that the recruits are too dumb to understand and handle complicated weapons. If the recruits today can not handle the weapons, the recruits in wartime will never be able to . . . a wartime force must always dig deeper into the category IV supply. The solution is not to malign the recruits; it is to take the user into account when the weapons are designed."[14]

While this study has shown that overall quality levels are higher under the AVF than they would be under the draft, the study group does agree that efforts are needed to encourage more college bound youth to serve a tour in the armed forces. But the cost of such incentives must be balanced against other priorities competing for the same resources. For example, the G.I. Bill educational program was a very generous scholarship, but it would have cost $1.5 billion per year—more than

Discussion of Readiness Problems

The concern that training reductions have adversely affected readiness is not really an AVF issue. In any system, draft or all-volunteer, DoD would strive for the most economical way to effectively train its manpower. The funding of training programs has been the subject of close scrutiny by the Services, DoD, the Congressional Budget Office, the Office of Management and Budget, and Congressional Committees. The concensus of opinion has been that a significant reduction could be made in the Services' training programs with a greater share of the training being assumed by the units. As a result, recent Service budgets have reflected reductions in funding for training programs. Unit commanders have assumed greater responsibility for training. There has been some dissatisfaction expressed by the Services with this change. Such criticism may be valid; however, because the new methods in training are in the process of implementation and test-

ing, it would be premature to evaluate the impact of the changes on unit readiness. DoD recognizes, however, that these changes must be carefully monitored and evaluated. If negative effects are noted, a return to some or all of the previous training policies may be accomplished with no change in the status of the AVF.

The number of junior enlisted personnel who are married has increased in recent years, in large part because with the 1972 pay readjustment they could afford it. This has resulted in an increase in family related problems. However, the married individual is reported to be more responsible and less prone to creating disciplinary problems than the young unmarried enlistee. Commanders generally state a preference for married personnel in spite of the family oriented problems.[30]

The need to provide child care for single parents and families with both parents in the military is similar to the everyday problems in society at large. The readiness requirements for deployment on short notice for indefinite and prolonged periods are unique to the military. While the individuals involved know their mobilization and crisis deployment responsibilities and are directed to make provisions for the care of their dependents, the growing number of members in these categories is a concern. The problem is not primarily an AVF or a woman problem. For example, there are many more single male parents than female and the problem predates the AVF, but it is a growing problem that needs attention.

The increasing number of women in the military has other implications. There is concern about the effect of women on the group dynamics essential for an effective military organization. However, as stated by Binkin and Bach:

> "It is important to point out that an understanding of the behavior and performance of men in groups, particularly under combat or sea duty conditions, is far from complete; an understanding of the behavior of women under these conditions is very small; and precious little is known about the effects of combining men and women."[31]

Sociologists talk about a "male-bonding" theory that men have a tendency to join together in male only organizations, especially those that deal with aggression such as politics, war and police work. For example, sociologist Lionel Tiger argues, "not only will males and females reject other females as potential leaders and defenders, but that males will reject females as colleagues."[32] Admiral Worth Bagley expressed that concern in testifying before Congress in 1975.

> "Since the inception of the Continental Navy, later the U.S. Navy, traditional male domination of warfare and seafaring has continued. Only recently has there been pressure for change. The naval profession —specifically the business of going to sea—has been advertised as, and accepted as, a closed club for men.
>
> The present male-dominated, sea-going facet of Navy life is one that is understood and accepted by the country and the men in the Navy. Men join the Navy for many different reasons; however, a certain portion join and remain in the Navy because they enjoy being in a job which has been historically associated with fellowship among men in a difficult and dangerous endeavor. Changing the fabric of the Navy Navy by integrating women into all combat roles might well reduce the attractions of the Navy to this segment of mankind as well as to some of those men who might, in the future, join the Navy and make it a career."[33]

While this male-bonding theory seems to explain past behavior, it is not supported by recent experience. In 1972–1973, 53 enlisted women (about 12% of the crew) served abord the *USS SANTUARY* in all of the major departments. The report of the experiment concluded, "Women can perform every shipboard function with equal ease, expertise, and dedication as men do . . . and may serve on board the *USS SANTUARY* . . . in perpetuity."[34]

The MAXWAC study found no difference in the performence of company level Army support units during 72-hour field exercises with female contents ranging from 0% to 35%. During the major month-long NATO REFORGER

Exercise in 1977, the Army studied both individual and unit performance during sustained field operations and found, "the presence of women soldiers . . . did not impair the performance of support units . . . (The tests) provide strong evidence that EW (enlisted women) can adequately perform their MOS-related duties in a REFORGER type field exercise."[35] These tests are about as close to actual combat as it is possible to simulate in peacetime. Of course, they are not combat, and the final test of any military organization can only be made on the battlefield. However, these tests, combined with the limited historical experience of women in combat, gives assurance that our forces with women are at least as effective as they would be if there were no women. Considering the higher enlistment standards required of women, the forces may be more capable than they would be with men only.

The Army tests have served to clear the air and make it possible to address, openly and directly, the concerns of field commanders that units with large numbers of EW may have reduced combat readiness . . ."[36] Women have been serving effectively alongside men in the military for forty years, including three wars, and over thirty years under the draft.

The nationwide experience of police and fire departments reinforces the military's conclusions and tends to refute the "male-bonding" theory.

Perceptions are important and there is evidence that wives of military members oppose the increasing role of women. Again, military experience indicates that the concern conjured up in anticipation generates more adverse reaction than is present after implementation. However, the concerns of the families of military members must be taken seriously and are an important part of many career decisions.

Patriotism

Perceived Problems

Probably the most sweeping allegation with respect to the AVF is the suggestion that today's volunteer is less

dedicated than was his draftee counterpart simply because he is better paid. This accusation comes in phrases such as "redefinition of military service in terms of the economic marketplace"[37], or ". . . most recruits view military service as just a job; the concept of duty, honor, and country as a motivation for service has little meaning"[38], or a fear of a developing ". . . classifical employee-employer relationship."[39] In the same vein, Senator Nunn is concerned that ". . . life in the military is becoming a job, not a service."[40]

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BACKGROUND STUDY

USE OF WOMEN IN THE MILITARY

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
(MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

MAY 1977

SECOND EDITION - SEPTEMBER 1978

Background Study

USE OF WOMEN IN THE MILITARY

Office of the Assistant Secretary of Defense
(Manpower, Reserve Affairs and Logistics)
Washington, D.C.
May 1977

PREFACE TO SECOND EDITION

The original background study on the use of women in the military was conducted in response to a request from Secretary of Defense Harold Brown during his first week in office. It provided background data with which to evaluate the Services' growth plans and to form the new administration's policies on use of women in the military. Since the study was published in May 1977, a number of major policy decisions have been made to expand both the number and role of women in the U.S. Armed Forces.

There has been considerable public interest in this topic and three printings of the study have been exhausted. In September 1978, a decision was made to produce a fourth printing, but to update the study to reflect the changes that have occurred in the sixteen months since the original publication.

This preface will briefly review the major changes. Additional information and update data are provided in Appendix F.

Based on this background study, the Manpower Issue Paper of July 29, 1977 raised issue with the limited growth in the number of enlisted women the Services programmed for FY 1979 through FY 1983. After careful review and discussion with Service leaders, the Secretary of Defense directed an increase in the number of enlisted women on active duty to double the FY 1976 number by FY 1983. This decision dramatically changes the strength and accession projections shown in Table 13 on page 19 of the original study. In their program objective memoranda (POMs) submitted in May 1978, the Services further increased

their projections to reach 207,800 enlisted women and 28,000 women officers by 1984.

These latest policy changes to further increase women in the military are based in part on a series of studies conducted by the Army called "The Women Content in the Army" or simply WITA. Two WITA tests were particularly important, because they examined individual and unit performance with women in the field under simulated combat conditions.

The MAXWAC tested women in the field on three-day exercises with women content ranging from 0% to 35%. The tests showed that there were no statistically significant differences in performance among units over this range of female content.

The second test, REFWAC, carefully studied women in the field during sustained combat related experiences. It evaluated unit performance and individual performance of women soldiers during the annual NATO "REFORGER" exercise in September 1977. This 30-day field exercise is about as close to sustained combat operations for large units as is possible to conduct in peacetime. The results reconfirmed the MAXWAC findings. Women in support units and combat support units and in combat unit headquarters above battalion level did not adversely impact upon unit performance. When properly trained and led, women are proving to be good soldiers in the field, as well as in garrison.[1]

Since the first edition of this background study was printed in May 1977, a number of other changes have affected women in the military. They are grouped into two categories: (1) changes in policy and (2) changes in law.

The major policy changes occurred in the Army, where there are no legal restrictions on the assignment of women. The Army had modified its policies to greatly extend the role of women in combat. As late as March 1977,

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[1] *Women Content in the Army—REFORGER 77 (REFWAC-77)* Washington, D.C., U.S. Army Research Institute for Behavioral and Social Sciences (ARI), 1978.

as shown on page B-8 of Appendix B of this study, the Army policy precluding women forward of the brigade rear boundary was affirmed. This policy was addressed on page 33 of the background study. In September 1977, the Army modified this assignment policy. Unit commanders now are authorized to employ assigned women anywhere on the battlefield to accomplish unit missions. Women are trained in self defense and unit defense. However, Army women are not assigned to units in infantry, armor, artillery, or combat engineering of battalion/squadron size or smaller. All other units are open to Army women, and unit commanders have been directed not to excuse soldiers from the performance of unit duties solely on the basis of gender.

On March 3, 1978, General Rogers, Chief of Staff of the Army, sent a personal message to his field commanders reemphasizing that women soliders are an integral and essential part of the Army and will deploy with their units in combat situations. Copies of these two important Army policy statements are included in Appendix F.

Since the background study was published the Army has terminated its separate basic training for women programs and moved to a single common basic training program for men and women soliders. However, many of the more senior NCO and officer women in the Army have not had the field training and experience of their male counterparts. The Army recognizes this problem and is addressing it, but time is essential to overcome the years of institutional differentiation in the roles of men and women in the Army.

Under the WITA study series, the Army has conducted an in-depth review of military occupational specialities (MOS) evaluating skills which are open and skills which are closed to women. As a result of this effort, a number of skills have been opened to women and the Army has a much better understanding of the problem areas in skills where women have been experiencing difficulties. The major problem is ensuring that women soldiers have the proper training and leadership. Strength and endurance

differences have caused problems in a few skills. A list of current skills open and closed to women is provided in Appendix F.

The Air Force is well into its pilot training program for women, discussed on page 41 of the background study. Officer and enlisted women are now being trained in all flight crew positions and will be used in the crews of support aircraft within the restraints of current law. The Air Force also has opened missile crew positions to women modifying the previous interpretation of combat restrictions discussed on page 42 of the background study.

The extent of the change in Air Force attitude toward the use of women is demonstrated by two examples. During the program review in the summer of 1977, mentioned on page "a" of this preface, the Air Force withdrew their POM projections for women which showed modest growth similar to the March 77 plan in Table 13 on page 19 of the background study and submitted a revised program to double the number of women by 1983.

In their POM submitted in the spring of 1978, the Air Force programmed a growth to over 90,000 women by 1984. That means that one out of every six people in the Air Force will be a woman and makes the Air Force the leader among the Services in the use of women.

The second category of changes affecting women in the military relates to the restrictive laws: 10 USC 6015 and 10 USC 8549 which preclude assignment of women to Navy ships or combat aircraft of the Navy and Air Force. On May 17, 1977, Senator William Proxmire introduced an amendment on the Senate floor to modify 10 USC 6015 and 8549 to expand the roles of women and place upon the Secretary of Defense the responsibility of setting assignment policies for women. The Department of Defense supported the amendment, but recommended minor modifications.

After floor debate, Senator Proxmire modified his amendment to require the Secretary of Defense to report on the definition of combat, to submit proposals to increase the number of positions open to women, and to make recommendations for law changes. On February 14,

1978, the Deputy Secretary of Defense responded to that request recommending that both 10 USC 6015 and 8549 be repealed, and strongly urging some modificiation to 6015 as soon as possible. A copy of the letter is in Appendix F.

The Congress included language to modify 6015 in the FY 1979 authorization bill. The President vetoed that bill, for other reasons; but modification of 6015 is expected to be included in the next authorization bill. The Navy is moving ahead on plans to assign women on some ships.

While this action was being considered in Congress, the courts also were reviewing the issue of restrictions on women in the Navy. A lower court ruled that 6015 was unconstitutional and that the Secretary of the Navy should determine assignment policy based on sound reasons rather than arbitrary legal constraints.

The Department of Defense plans to submit legislation to repeal 10 USC 6015 and 8549, putting the Navy and Air Force under procedures similar to the Army, where the Service Secretary sets assignment policy for both men and women.

Appendix F has been added to the background paper to provide updated data on a number of the areas covered by the original study. The additional data does not materially change the findings of the background study except that the Army, Navy and Air Force now plan much larger increases in the number of enlisted women in the coming years than were included in the background study. The Marine Corps already was planning to double its enlisted female content, so was unaffected by the decision.

Additional information on comparative lost time between men and women also is provided on Appendix F. The lost time studies are far from definitive, but comparative lost time differences do not appear to be significant enough to affect decisions on the use of women in the military.

The original background paper provides the basis for decision-making in the FY 1977 and FY 1978 time frame;

and, with the updates provided, it now is current through the program decisions of August 1978.

/s/ _____

R. W. HUNTER
Director
Manpower Program Analysis

PREFACE

On January 27, 1977, Secretary Brown requested a priority analysis of the utilization of military manpower to determine where we can reduce requirements and realize personnel management economies. As part of that analysis, he requested a study on the use of women in the military.

The study was led by Commander Richard W. Hunter, USN, Office of the Deputy Assistant Secretary of Defense (Planning and Requirements). The analysis focused on enlisted women. It drew on three primary sources: (1) information available in the Office of the Secretary of Defense and the Defense Manpower Data Center files; (2) specific data submitted by the Services in response to tasking for this study; and (3) the results of related studies by other government offices and private organizations. Martin Binkin and Shirley Bach of the Brookings Institution were preparing a book entitled *Women and the Military* during the period of research on this paper. Their cooperation was indispensible, as was the participation of the Service action officers and the reviewing authorities in the Services, the Joint Staff and the Office of the Secretary of Defense.

This paper is a background analysis. It examines the performance of enlisted women in the military from a number of perspectives including promotion, retention, cost, and potential problems. The potential to use more women is addressed in terms of the market, the quality of accessions and the limits on the number of officer and en-

listed women who can be used based on the current laws and policies. Finally, the Services' projected strength and accession plans are considered.

The appendices to this paper include the original correspondence which requested data from the Services, and information provided by the Services to the Office of the Secretary of Defense during the study.

EXECUTIVE SUMMARY

Purpose: On January 27, 1977, Secretary of Defense Brown requested a priority analysis of military manpower utilization, including the utilization of women in the military. This study was undertaken to gather and analyze data on the use of enlisted women serving on active duty in the military. While there seems to be little problem in obtaining enough well qualified officers in the military, there may be problems in obtaining enough high quality enlisted men. For this reason, this study focuses primarily on enlisted women. Its purpose is to evaluate the current use of enlisted women serving on active duty in the military and to estimate how many enlisted women could be used by 1982. A subsequent effort will address women in the reserve components.

Approach: The information collected routinely by the Office of the Secretary of Defense and the data files of the Defense Manpower Data Center were used to evaluate the growth in the number of enlisted women, and their relative performance from various management perspectives. The Services submitted data requested in specific formats from which estimates were made of the potential to use more enlisted women. Previous studies by both private and public organizations were reviewed. Both the savings and potential problems of additional women were addressed.

Findings:

— The number of enlisted women on active duty more than tripled from 1971 through 1976.

— Active duty women are being promoted the same as, or at higher rates than men in all occupations open to women.

— Women on active duty are retained at about the same overall rates as men, although they have higher loss rates than men in non-traditional occupations.

— The Services have made significant progress in expanding the use of women in non-traditional skills.

— The Navy, Air Force and Marine Corps are planning significant increases in the number of enlisted women on active duty in the 1978 to 1982 period. The Army's current plan, however, calls for no growth in enlisted women after 1979.

— 10 USC 6015, which precludes women from serving in Navy ships, limits the number of women the Navy can use. The Navy's growth plan approaches that limit by 1983. Many positions on ships could be filled by women if this law were changed or repealed

— There are more high quality women willing to enlist than are now accepted.

— Significant savings and quality improvement are possible through the expanded use of enlisted women. Cost avoidance could exceed $1 billion annually by 1982.

— There are still many unanswered questions, including: What are the costs in terms of flexibility, response to uncertainty, readiness, and deployability of having more women in the military who are precluded from combat service? What is the impact of women with small children on these factors? What is the comparative lost time of men and women, and what impact does it have? Will more or fewer women be willing to enlist, if they are required to serve in combat support units, aboard ships, or in non-traditional skills? We need answers to these questions.

— Continued expansion of the number of enlisted women used in the military can be an important factor in making the all-volunteer force continue to work.

USE OF WOMEN IN THE MILITARY

INTRODUCTION

To put this study in context, one must remember that the overriding issue is maintaining the combat effectiveness of the armed forces. Within that context, the use of women in the military is a question of increasing importance, for two reasons. First is the movement within the society to provide equal economic opportunity for American women. Second, and more important, use of more women can be a significant factor in making the all-volunteer force continue to work in the face of a declining youth population.

There has been little problem to date in getting enough well qualified officers, and the future looks good for meeting officer needs. There may, however, be problems in obtaining enough high quality enlisted men. Because of this need, this paper will focus on the 1.8 million enlisted positions. How many of these positions can and should be filled by women?

Recruiting more high school graduate women for active duty in the all-volunteer force can have two effects: (1) improve quality or (2) save money. We measure quality by test scores and level of education (whether or not the enlistee has completed high school). In the current recruiting market, high quality women can be recruited at about the same cost as low quality men. Substituting women for men could improve the quality of the force, at no extra cost. (See page 24)

Women and low quality men are cheaper to recruit than high quality men because they are attracted at no additional cost by the recruiting and advertising effort which is necessary to recruit sufficient numbers of high quality men.

Recruiting additional high quality women in lieu of high quality men would result in reductions in recruiting costs. The marginal recruiting cost is expected to rise sharply, as the supply of qualified 18–20 year old males shrinks in the 1980s. A decrease in youth unemployment would make the market even tighter. The success of the all-volunteer force may well depend on reducing the number of young male high school graduates the Department needs to recruit each year. This is potentially the major benefit of using more women, but it is not without costs. (1) Women tend to be physically weaker than men which limits some of the work they can do. (2) Presently women are excluded from combat units and positions calling for combat skills. This reduces assignment flexibility. (See page 25)

Most of the other arguments favoring both more and less women in the military have centered on emotionalism and have been supported by unsubstantiated generalities, or isolated examples. It is the intention of this paper to report where the Defense Department stands on the use of women in the military and what factual information is available as to where we can expect to be in the next five years.

Because there are so many unknowns in this area, many people have cautioned against moving too rapidly in expanding the number of women in service. For example, the Army response to requests for information for this study stated, "We should err on the side of national security until such time as we have confidence that the basic mission of the Army can be accomplished with significantly more female content in the active force." Clearly we should err on the side of national security, but what does that mean?[1]

The tradeoff in today's recruiting market is between a high quality female and a low quality male. The average

[1]The Army staff explained that to err on the side of national security means that men have proven themselves in ground combat for centuries—we know the Army will fight effectively with men. We do not know this for women.

woman available to be recruited is smaller, weighs less, and is physically weaker than the vast majority of male recruits. She is also much brighter, better educated (a high school graduate), scores much higher on the aptitude tests and is much less likely to become a disciplinary problem. (See pages 22–25.)

To put the question bluntly: Is recruiting a male high school dropout in preference to a smaller, weaker, but higher quality female erring on the side of national security, in view of the kinds of jobs which must be done in today's military? The answer to that question is central to the decision on how many women should be used in the various Services. Sometimes the answer will be yes, and sometimes it will be no, but the question continues to be relevant. It will be addressed in some detail during this report.

The Department of Defense is striving to make the all-volunteer force continue to work. It is in this context that the expanded use of women serving on active duty in the military must be evaluated. A subsequent study will address the 45,000 women serving in the reserve components.

BACKGROUND

Prior to World War II, the military forces of the United States were almost exclusively male, notwithstanding the legendary women warriors such as Molly Pitcher, Deborah Sampson, and Lucy Brewer. Of course, there were many women who served as nurses, cooks, launderesses, seamstresses, and in other female pursuits of the day.

With the industrial revolution of the 19th Century, American women were developing skills which were becoming increasingly relevant to both the battlefield and the support of military operations. During World War I, over the protests of General Pershing, the Army held fast to its prohibition against enlisted women; but the Navy and Marine Corps admitted some 13,000 women into clerical skills in the shore establishment. After the war, these services returned to their all male compositions.

The massive mobilization of World War II created conditions for significant numbers of women to enter the military services. About 350,000 women served in one of the four military services and many others served in quasi-military support units, such as the WASP whose 800 women pilots ferried war planes around the world. During World War II, American women showed their competence in essentially every occupation except direct combat. They drove trucks, changed tires, repaired airplanes, rigged parachutes. Some were gunnery instructors. Others were air traffic controllers and naval air navigators.

Eventually, 2,000 Army women served in the Mediterranean theater of operations and 8,000 in Europe. Some 5,000 women served in Australia, New Guinea and the Philippines. Women served in the North African and Italian campaigns. The first WAC unit landed in Normandy on D+38. The WACs followed close behind the fighting forces. Food, quarters, and supplies were the same as those available to the men. Some operated within 12 miles of the front line. Statistics from the European theater of operations, where women lived in conditions similar to noncombatant men, show that somen had the same casualty rate (0.5%) as noncombatant men and a lower hospitalization rate (2.2% vs. 2.5%). Women developed psychological disorders less frequently than men. Their venereal disease rate was one-sixth that of men. The WAC pregnancy rate was negligible. Their disciplinary rates were much lower than those of men.[1]

During demobilization following World War II, the number of women in the military declined from 266,000 or 2.2% of 12.1 million man force in 1945, to just over 14,000 or 1% of the 1.4 million man force in 1948. Positions again became restricted to the more traditional roles for women, but the passage of the Women's Armed Forces Integration Act of 1948 did give American women the opportunity for the first time to follow a military career.

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[1] Women in the Army Study, Ch. 2.

With the advent of the Korean War, an unsuccessful effort was made to recruit some 100,000 women to meet the rapidly expanding manpower requirements. Young women just were not interested in serving, perhaps because of the unpopularity of that war at the time. Between 1948 and 1969, even including nurses, the percentage of women in the military never exceeded 1.5% and averaged 1.2% of total active strength.

In mid-1960s, two major factors began to combine to change the role of women in the military again. One was the pressure from the expanding role of women in the society in general, where they were entering the labor force in ever increasing proportions and filling many positions which were previously for men only. The second factor was the increasing need for military manpower to meet the demands of the Vietnam conflict.

In 1967, Congress removed the 2% limit on the number of women who could be in the military, removed the prohibition to women officers holding permanent commissions above grade 0–5 and eliminated the existing differences in the retirement laws which had applied to women. Although Congress has removed the limit on the percentage of the force which could be women, the growth in the number of women was slow until 1971, as discussed in the next section. During the next five years, through 30 September 1976, the number of women, including both officers and enlisted, increased rapidly to over 5% of the total active military strength.

GENERAL ANALYSIS:

The central issue of this paper is meeting DoD's enlisted manpower requirements—this is where the all-volunteer force will succeed or fail, and this is where most of our recruiting money and effort are aimed. This analysis therefore concentrates on the use of enlisted women. Women officers will be addressed only briefly, in each of the service sections that follow this general analysis (pages 31–46).

This analysis will consider the growth in the number of enlisted women from a series of perspectives using data from the following sources: (1) Information available in the office of the Secretary of Defense and the Defense Manpower Data Center files; (2) Specific data submitted by the Services in response to tasking for this study; and (3) the results of previous studies by other government offices and private organizations.

Female Strength

Table 1 shows the number of enlisted women in thousands and the percent of the total force they represent by fiscal year. The low point for the ten year period was in 1967, the same year Congress removed the limits on the number of women. The growth in the number of women was slow, it took four years for the percentage of enlisted women to increase a half of a percentage point, from 0.76% in 1967 to 1.28% in 1971. In the next five years, from 1971 to 1976, the percentage of enlisted women in the military increased more than three fold, to 5.33% in 1976. This is more than twice the World War II percentage. While the Department of Defense was reducing its enlisted strength from 2.3 million to 1.8 million, it increased the number of women from 30 thousand to 95 thousand. Almost half of that increase was in the Army alone.

TABLE 1

FEMALE ENLISTED PERSONNEL (000s) AND PERCENT OF TOTAL ENLISTED PERSONNEL BY SERVICE AT END FISCAL YEAR

	ARMY		NAVY		MARINE CORPS		AIR FORCE		DOD TOTAL	
Fiscal Year	No.	%	No.	%	No.	%	No.	%	No.	%
1966	9.2	0.65	5.4	0.62	1.7	0.70	5.0	0.67	21.3	0.78
1967	9.7	0.75	5.5	0.63	2.1	0.81	5.2	0.68	22.6	0.76
1968	10.7	0.76	5.7	0.64	2.6	0.90	6.1	0.80	25.1	0.80
1969	10.7	0.80	5.8	0.64	2.4	0.86	7.4	1.02	26.3	0.87
1970	11.5	1.00	5.8	0.95	2.1	0.90	9.0	1.37	28.4	1.07
1971	11.8	1.22	5.9	1.09	2.0	1.04	10.1	1.62	29.9	1.28
1972	12.3	1.80	6.3	1.22	2.0	1.16	11.7	1.95	32.4	1.64
1973	16.5	2.41	9.2	1.87	2.0	1.12	13.0	2.63	42.6	2.22
1974	26.3	3.90	13.4	2.81	2.4	1.41	19.5	3.68	61.6	3.33
1975	37.7	5.36	17.5	3.79	2.8	1.60	25.2	5.01	83.3	4.56
1976	43.8	6.46	19.3	4.21	3.1	1.77	29.2	6.08	95.4	5.33

Accession Changes

As Table 1 shows, the Army, Navy, and Air Force have made large increases in the number of women in the military in the last five years. This increase is the result of expanded female, non-prior service, accessions. Table 2 shows the numbers of women recruited during these years and what percentage of the total non-prior service accessions they represent.

TABLE 2

FEMALE ENLISTED NON-PRIOR SERVICE ACCESSIONS (000s) AND PERCENT OF TOTAL NON-PRIOR SERVICE BY SERVICE

Fiscal Year	ARMY		NAVY		MARINE CORPS		AIR FORCE		DoD TOTAL	
	No.	%	No.	%	No.	%	No.	%	No.	%
1972	6.0	3	2.2	2	0.7	1	4.6	5	13.6	3
1973	8.3	4	4.9	5	0.7	1	6.2	7	20.3	5
1974	15.1	8	6.8	8	0.9	2	8.0	11	30.9	8
1975	18.4	10	6.4	7	1.3	2	10.0	13	35.9	9
1976	15.8	9	5.0	6	1.4	2	8.8	12	30.9	8

All Services have increased both the number of women accessions and the percent of total accessions which are women by two to three fold over the five years. Table 2 also shows that Navy female accessions peaked in 1974, and that Army accessions peaked in 1975. The Air Force plan calls for even larger accessions in 1977 and 1978 than shown on Table 2, followed by a reduction to stabilize at a strength growth rate of 2,000 women per year.[1]

Women by Grade

As a result of the recent rapid build-up and to a lesser extent to previous retention experience, a relatively larger percentage of women are in pay grades E-1 through E-4 and a relatively larger percentage of men are in each pay grade E-5 through E-9, as shown on Table 3.

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[1] Both Tables 1 and 2 show that the Marine Corps did not follow the trend of the other Services. The current Marine Corps plan is to more than double their female content over the next five years. Future plans are discussed in more detail in the Service Sections which follow this general analysis.

TABLE 3

Enlisted Personnel by Sex and Service as of 30 June 1976
(Percent of the Male/Female Force Segments in Each Paygrade)

Grade	Army		Navy		Marine Corps		Air Force		DoD	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
E-1	9.32	9.85	5.79	7.15	13.63	12.04	3.96	8.47	7.41	8.95
E-2	14.35	17.33	15.32	17.84	18.92	20.42	8.34	18.36	13.46	17.85
E-3	15.40	22.18	16.93	32.26	20.79	23.52	18.97	38.58	17.29	29.28
E-4	23.81	34.47	19.65	30.45	16.95	20.39	24.44	28.81	22.22	31.47
E-5	16.47	12.77	17.85	10.16	13.76	15.17	20.86	4.75	17.72	9.86
E-6	11.02	2.41	14.83	1.60	6.25	5.87	12.85	0.63	12.21	1.81
E-7	7.10	0.77	7.10	0.43	5.07	1.73	7.42	0.27	6.98	0.58
E-8	1.96	0.20	1.78	0.07*	1.92	0.65*	2.11	0.10	1.95	0.16
E-9	0.58	0.02*	0.75	0.04*	0.71	0.20*	1.05	0.04*	0.76	0.04

*Cell contains 25 or fewer personnel.

Source: Active Military Master Files for 30 June 1976

Promotion

Some people may look at Table 3 and conclude that the lower percentage of women in the senior grades is the result of prejudicial promotion policies. Such is clearly not the case, as shown on Table 4. Women with the same number of years of service have as high mean pay grades as their male cohorts, if not higher.

TABLE 4

Mean Enlisted Paygrade by Service, Sex, and Year Group as of 30 June 1976

Years	Army		Navy		Marine Corps		Air Force	
	Male	Female	Male	Female	Male	Female	Male	Female
1	1.80	2.03	2.04	1.99	1.67	1.81	1.80	1.75
2	3.15	3.43	2.91	3.10	2.85	3.26	2.98	3.02
3	3.81	3.99	3.42	3.55	3.53	4.12	3.36	3.42
4	4.24	4.50	4.07	4.06	4.06	4.85	3.97	3.99
5	4.59	4.84	4.52	4.63	4.57	4.99	4.11	4.08
6	4.88	5.02	4.83	4.82	5.01	5.39	4.31	4.25
7	5.13	5.21	5.05	4.99	5.40	5.72	4.55	4.46
8	5.27	5.40	5.26	5.13	5.57	6.00	4.76	4.74
9	5.42	5.58	5.39	5.27	5.74	6.07	4.94	4.96
10	5.56	5.73	5.56	5.60	5.92	6.23*	5.06	5.05
11	5.78	5.96	5.71	5.71	6.20	6.38*	5.20	5.14
12	6.00	6.21	5.78	5.96*	6.35	6.75*	5.29	5.30
13	6.18	6.38	5.97	6.00	6.50	6.67*	5.46	5.31
14	6.30	6.43	6.14	6.13*	6.68	7.00*	5.59	5.55
15	6.46	6.73	6.24	6.29*	6.78	7.20*	5.81	5.94
16	6.62	6.78	6.31	6.18	6.89	7.00*	5.93	5.77*
17	6.72	6.94	6.48	6.20*	6.99	7.40*	6.04	5.79*
18	6.82	7.09	6.62	6.52*	7.17	7.25*	6.17	6.03
19	6.91	7.00	6.73	6.33*	7.27	8.00*	6.31	6.59
20	6.96	7.11	6.93	6.50*	7.29	8.12*	6.40	6.22*
20+	7.70	7.60	7.42	7.26	8.17	8.50*	7.28	7.40

*Cell Contains 25 or fewer personnel.

Source: Active Military Master Files for 30 June 1976

NOTE: A higher percentage of women enter at an advanced pay grade for education or experience

Table 5 factors the mean pay grade information for first term personnel into major occupational categories (using one digit DOD occupational codes).

First tour enlisted women have somewhat higher mean pay grades than men in the areas of administration and medical/dental which have long been open to women.

TABLE 5

Mean Enlisted Paygrade by Occupation, Sex, Selected Year Group and Service as of 30 June 1976

	Elec Eq Repair		Comm/ Intel		Med/Den		Tech		Admin		Maint		Crafts		Svcs/ Sup	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Army																
Year 1	2.34	2.43	2.18	2.38	2.48	2.69	2.82	3.46	2.28	2.52	2.22	2.43	2.29	2.45	2.19	2.35
2	3.22	3.24	3.17	3.40	3.30	3.68	3.70	4.06	3.23	3.53	3.15	3.25	3.39	3.41	3.27	3.27
3	3.94	4.05	3.84	3.94	4.04	4.20	4.12	4.22	3.82	4.00	3.78	3.86	3.89	3.91*	3.82	3.92
4	4.55	4.43*	4.34	4.41	4.55	4.73	4.52	4.37	4.32	4.44	4.23	4.21*	4.28	4.00*	4.29	4.37
Navy																
Year 1	3.29	3.58	2.46	2.86	2.25	2.26	2.27	2.50	2.26	2.27	2.51	2.30	2.34	2.00*	2.07	2.15
2	3.56	3.56	3.00	3.29	3.02	3.11	3.11	3.49	3.02	3.27	3.06	3.39	3.00	3.43*	2.74	3.04
3	3.96	3.97	3.62	3.78	3.37	3.40	3.60	3.75	3.70	3.88	3.60	3.86	3.44	3.52*	3.36	3.53
4	4.34	4.27	4.24	4.20	4.10	3.90	4.13	4.06	4.21	4.20	4.22	4.00	4.06	4.20*	3.86	4.00
Marine Corps																
Year 1	2.32	3.50*	2.10	2.10*	--	--	2.48	3.30*	2.09	2.20	2.14	2.57*	1.97	2.29*	2.03	2.10
2	3.22	3.13	2.95	3.11	--	--	3.14	4.34	3.10	3.33	2.96	3.09	2.87	3.15	2.77	3.10
3	3.99	3.94*	3.67	4.00	--	--	3.83	4.59*	3.81	4.16	3.60	3.92*	3.56	4.25*	3.39	3.56*
4	4.51	4.90*	4.23	5.10*	--	--	4.21	5.00*	4.39	4.81	4.15	5.00*	4.14	5.00*	3.89	5.00*
Air Force																
Year 1	2.22	2.12	2.12	2.11	2.03	1.97	2.05	2.16	2.00	2.00	2.08	2.01	1.99	2.02	2.14	2.00
2	3.02	3.03	3.00	3.00	2.98	3.01	3.00	3.22	2.98	3.02	2.98	3.02	2.96	3.01	2.97	2.99
3	3.49	3.45	3.37	3.40	3.30	3.31	3.33	3.49	3.34	3.43	3.32	3.43	3.24	3.39	3.33	3.44
4	3.99	3.99	3.98	3.99	3.97	3.99	3.99	4.11	3.97	3.99	3.97	3.97	3.95	3.95	3.96	3.99

*Cell contains 25 or fewer personnel.

Source: Active Military Master Files for 30 June 1976

NOTE: A higher percentage of women enter at an advanced paygrade because of education or experience.

Women are, also, holding their own in the nontraditional areas of crafts, electronic equipment repair, technical and maintenance. Since enlisted men and women in each skill area compete in a common promotion system, these higher grades for women apparently indicate better relative performance. This may, in part, reflect the higher entrance standards for women. Grade differences are less in the Air Force, where the quality differences between average men and average women also are less.

Retention

Are women retained in service at the same rate as men; or do they attrite at higher rates because of marriage, pregnancy, non-adaptability and other causes which could be postulated? Between 1960 and 1970 enlisted women had shorter terms of service, in part because women who became pregnant were discharged. However, experience since 1970 is just the reverse. A study of accessions for years 1971 through 1976, reveals that women are being retained at a higher rate than men.

Table 6 shows the number of male and female accessions in each of the six years and what percentage of them were still on active duty at the end of June 1976. For example, Table 6 shows that 14.1% of the 293,345 males who en-

tered the Army in FY 71 were still on active duty on June 30, 1976, while 22.7% of the 5,600 females who entered in FY 71 remained on active duty on June 30, 1976. For DoD as a whole, women had higher retention than men in all six years.

TABLE 6

Number of FY71 to FY76 Accessions Remaining on Active Duty as of 30 June 1976 by Sex and Service

	Male		Female	
	Accessions	Percent on AD 6/76	Accessions	Percent on AD 6/76
FY71 *				
Army	293,345	14.1	5,600	22.7
Navy	73,748	21.4	2,377	19.1
Marines	51,882	15.0	714	24.9
Air Force	89,582	25.0	4,383	24.6
DOD	508,557	17.6	13,074	22.8
FY72 *				
Army	176,376	22.0	5,958	27.2
Navy	84,926	22.1	2,170	25.0
Marines	53,893	22.2	717	25.2
Air Force	80,550	28.5	4,744	30.8
DOD	395,745	23.4	13,589	28.0
FY73 *				
Army	194,706	26.3	8,336	34.6
Navy	88,665	43.0	4,949	45.7
Marines	48,255	41.1	691	23.3
Air Force	85,612	55.4	6,339	54.5
DOD	417,238	37.5	20,315	43.1
FY74				
Army	164,885	53.4	15,083	59.1
Navy	83,071	60.5	6,693	64.6
Marines	43,529	55.8	850	39.2
Air Force	64,203	69.7	8,174	66.1
DOD	355,688	58.3	30,800	61.6
FY75				
Army	161,759	72.1	18,540	73.9
Navy	89,433	75.7	6,459	79.3
Marines	54,081	73.3	1,325	65.4
Air Force	63,486	80.7	9,752	79.0
DOD	368,759	74.6	36,076	75.9
FY76				
Army	163,009	85.3	15,791	86.0
Navy	79,298	89.3	5,009	90.0
Marines	50,213	86.1	1,261	82.3
Air Force	62,630	91.6	8,614	90.1
DOD	355,150	87.4	30,675	87.7

Source: MARDAC Report Number 3058, "Separation Rates from Service for Accession Cohorts by Length of Service, Sex and Race"

* NOTE: Some of Army's male accessions were draftees and all Services had male draft-induced volunteers.

Table 7 contains a breakdown of the annual loss rates for each of the six year groups discussed in Table 6. Note the very high first year loss rates for women who entered service in 1971 and 1972. These high losses may reflect the very strict policies then in effect for women, particularly discharge for pregnancy. During those same years, the Services, especially the Army, had a limited discharge policy for men. They did not want to encourage men to dropout to evade combat service. Since 1972, both policies have been liberalized to permit women to have children on active duty and men to be released who do not want to stay in the military.

The Army states that when quality is held constant, first term men are retained at about a 10% higher rate than women. But quality in the recruiting market is not constant. Tables 6 and 7 show that the first term attrition of women is lower than it is for men.

Comparing male and female attrition in the third year of service for the Army, third and fourth year for the Marine Corps and fourth year for the Navy and Air Force, on Table 7, demonstrates that women generally have reenlisted at higher rates than men. Only limited information is available at this time on the career behavior of women, since only very small numbers of women have progressed through entire careers. From the limited data available, it appears that women may leave active duty after reenlisting at higher rates than men. Such behavior, if it continues to occur, would reduce the relative number of women in senior enlisted positions, but also would reduce future retirement costs. Retention of career women is another area where we need more experience and better data before definitive judgments can be made.

TABLE 7

PERCENT ATTRITION** BY LENGTH OF SERVICE AND SEX: FY 71-FY 76 ACCESSION COHORTS

Length of Service	FY71		FY72		FY73		FY74		FY75		FY76	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Army												
0-11 Months	9.9	26.4	12.7	23.2	11.9	12.4	20.2	19.2	20.8	18.8	14.7*	14.0*
12-23 Months	40.0	24.1	16.6	21.5	14.6	19.2	13.6	13.0	7.1*	7.3*		
24-35 Months	21.4	10.5	22.5	10.7	25.4	11.3	12.8*	8.7*				
36-47 Months	13.1	13.5	24.5	15.2	21.8*	18.5*						
48-Present	1.5	2.8	1.7*	2.2*								
Cumulative	85.9	77.3	78.0	72.8	73.7	65.4	46.6	40.9	27.9	26.1	14.7	14.0
Navy												
0-11 Months	14.4	22.4	16.0	20.4	14.7	18.9	18.0	16.4	17.1	14.3	10.7*	10.8*
12-23 Months	12.6	16.3	11.0	13.1	12.0	13.0	12.8	12.3	7.2**	6.4*		
24-35 Months	9.0	15.9	9.6	16.2	14.7	11.2	8.7*	6.7*				
36-47 Months	19.2	22.7	22.1	22.3	15.6*	11.2*						
48-Present	23.4	3.6	19.2*	3.0*								
Cumulative	78.6	80.9	77.9	75.0	57.0	54.3	39.5	35.4	24.3	20.7	10.7	10.0
Marines												
0-11 Months	21.2	27.0	9.5	27.1	12.0	34.6	13.8	24.6	18.0	24.1	13.9*	17.7*
12-23 Months	12.2	19.8	15.2	18.3	12.6	16.1	13.4	22.2	8.7*	10.5*		
24-35 Months	20.9	12.9	26.5	14.8	22.6	18.8	17.0*	14.0*				
36-47 Months	12.1	10.9	13.0	10.3	11.7*	7.2*						
48-Present	14.6	4.5	13.5*	4.3*								
Cumulative	81.0	75.1	77.7	74.8	58.9	76.7	44.2	60.8	26.7	34.6	13.9	17.7
Air Force												
0-11 Months	9.1	24.9	11.8	22.0	13.2	17.1	13.0	16.9	11.9	14.0	8.4*	9.9*
12-23 Months	9.3	16.8	9.6	14.7	14.4	14.2	12.2	12.1	7.4*	7.4*		
24-35 Months	7.4	9.7	9.2	9.2	7.4	8.4	5.1*	4.9*				
36-47 Months	26.4	12.4	17.0	10.5	9.6*	5.8*						
48-Present	22.8	11.6	23.9*	12.8*								
Cumulative	75.0	75.4	71.5	69.2	44.6	45.5	30.3	33.8	19.3	21.0	8.4	9.9
DOD												
0-11 Months	11.6	25.2	12.8	22.5	12.8	17.9	17.6	18.1	18.0	16.9	12.6*	12.3*
12-23 Months	27.7	20.0	13.8	17.7	13.8	14.0	13.1	12.9	7.4*	7.2*		
24-36 Months	17.1	11.3	17.6	13.3	19.1	10.6	11.0*	7.4*				
36-47 Months	16.2	14.7	20.9	14.4	16.8*	12.4*						
48-Present	9.8	6.0	11.6*	6.1*								
Cumulative	82.4	77.2	76.6	72.0	62.5	56.9	41.7	38.4	25.4	24.1	12.6	12.3

SOURCE: HARDAC Report Number 3058, "Separation Rates from Service for Accession Cohorts by Length of Service, Sex and Race"

* Includes end of service losses. Prior to 1973 there were draftees, draft induced volunteers and men on some two year enlistments.

** Latest experience, but incomplete.

Based on this data, who could conclude that as career potential increases for women and the quality of accessions remain high, the retention of women in the military is comparable to that of men, in spite of some sociological pressures, such as marriage and family, which tend to limit women's continuous participation in the labor market.

Losses from Skills

In previous sections, it was shown that women were promoted at rates similar to men in a wide variety of skills and that overall retention of women compared favorably with men. The loss rates of women from occupation groups is very different, as shown in Table 8.

These losses from occupation groups represent people who have switched to a different skill, as well as those who have left the Service.

TABLE 8

ATTRITION

PERCENT ATTRITION** AS OF 30 JUNE 1976 BY SEX AND DoD OCCUPATIONAL GROUP: FY 73 TO FY 75 ENLISTED NON-PRIOR SERVICE ACCESSIONS

	Elec Eq Repair		Comm/ Intel		Med/Den		Tech		Admin		Maint		Crafts		Svcs/ Sup	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
FY73 Accessions																
Army	79.5	93.4	68.6	40.3	68.6	28.9	69.4	69.3	69.3	40.8	78.1	95.3	80.2	96.9	70.4	84.7
Navy	43.3	65.0	48.4	28.4	34.4	16.0	52.4	27.7	58.1	27.0	39.6	87.1	37.0	90.4	75.4	78.4
Marines	70.9	78.4	60.4	80.0	--	--	56.2	56.3*	63.2	49.5	57.1	98.8	64.2	88.2*	48.6	84.4
Air Force	25.2	63.8	41.0	21.8	42.3	25.5	30.0	41.6	41.3	20.5	32.7	82.0	39.6	74.5	37.5	63.5
DoD	50.9	76.3	56.9	30.7	54.0	24.6	53.0	48.5	59.6	30.1	52.6	90.2	55.1	88.1	50.4	76.8
FY74 Accessions																
Army	48.3	77.3	33.0	18.9	45.1	9.8	31.6	30.0	37.9	17.5	41.4	87.6	41.6	89.0	40.9	43.3
Navy	23.7	39.1	28.6	18.3	24.1	9.6	39.7	17.6	45.4	16.2	22.5	70.4	22.4	83.0	58.2	60.7
Marines	52.9	76.8	38.4	36.5	--	--	40.2	33.3*	44.3	27.7	36.3	88.6	44.8	84.6	28.9	71.7
Air Force	15.9	23.7	27.1	24.1	24.7	21.0	14.3	22.4	28.8	19.1	22.4	35.4	25.8	50.2	24.5	36.2
DoD	31.1	43.0	31.6	20.2	35.9	12.0	28.7	25.2	38.1	18.1	31.1	60.0	32.6	73.6	36.3	43.8
FY75 Accessions																
Army	25.6	38.1	16.3	8.8	21.5	6.2	14.9	14.2	18.7	9.2	19.3	38.4	18.4	35.2	18.1	15.7
Navy	7.7	22.2	11.7	6.5	13.3	4.3	36.7	13.3	26.5	11.4	11.1	49.0	10.3	75.9	31.2	34.1
Marines	43.9	24.5	16.9	32.8	--	--	23.1	9.1	16.2	14.7	19.8	54.2	21.2	25.9	11.7	17.8
Air Force	7.4	13.9	14.9	16.5	15.3	6.4	6.1	9.6	10.1	5.9	10.8	20.6	9.1	18.4	8.5	13.1
DoD	14.9	23.4	15.0	9.7	19.4	6.0	14.2	12.5	12.0	8.8	16.0	31.1	13.8	27.5	15.2	16.1

* Includes end of service losses.
** Cell contains 25 or fewer accessions.

Losses from the most non-traditional skills are much higher for women than men. In electronic equipment repair, 76% of the 1973 female accessions had left the occupation group by the end of fiscal year 1976 as compared to 51% for male. In the same year group, 90% of the women had left maintenance as compared with 53% of the men. In crafts, 88% of the women were gone and 55% of the men. Even in services and supply handling, 77% of the women had left that skill as compared with 58% of the men.[1] Those women in the most traditional skills had much lower loss rates than men. In administration, only 30% of the women had left at the end of three years as compared to 60% for the men. In communications/intelligence, 31% of the women were gone as compared to 57% of the men. In medical/dental, there was a 25% loss rate for women and 54% for men.

There are two possible explanations of these data: (1) many women who do not adjust well in non-traditional skills may be leaving the Service; (2) women who try non-traditional occupations may be migrating to the more traditional ones. In either case, these higher losses from non-traditional skills may represent inefficient use of training resources.

Distribution by Occupation Group

Table 9 shows the distribution of women in each service as a percentage of the total in each occupation group. For DoD as a whole, 33 percent of the women are in the administrative/clerical group. Twenty percent of the women are in the "other" category which includes those in training and reflects the distortion resulting from the rapid growth in the number of women. Only 11 percent of the women are in one of the four more non-traditional areas (electronic equipment repair, technical, maintenance or craftsman).

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[1]These high loss rates in non-traditional skills should be viewed in the context of small sample sizes and the newness of women being assigned in such skills.

TABLE 9

PERCENTAGE OF ENLISTED WOMEN BY OCCUPATIONAL GROUP
END FY 76

OCCUPATIONAL GROUP	ARMY	NAVY	USMC	USAF**	DOD
0 Infantry, Gun Crew, Seamanship	0	0	0	0	0
1 Elec. Equipment Repair	1	4	3	6	3
2 Communications and Intelligence	14	14	5	9	12
3 Medical and Dental	16	21	*	11	15
4 Other Technical	2	2	3	2	2
5 Administrative and Clerical	32	25	54	37	33
6 Electrical/Mechanical Repair (Maintenance)	4	2	2	10	5
7 Craftsman	1	0	2	2	1
8 Service and Supply	10	2	11	8	8
9 Other	21	29	21	15	21
TOTAL	100	100	100	100	100

* Covered by Naval Personnel.
** Air Force has readjusted the conversion of AFSC to DoD occupational codes, reducing the number of people in administration and increasing the number in other occupations, subsequent to the effective date of this table.
SOURCE: MARDAC Run 3036

Concentration of Women

It is also relevant to consider the concentration of women in these occupational groups. Table 10 shows what percentage of the people in each occupational group are women. About 18% of enlisted people in the medical/dental field are women, as are 11% of the administrative/clerical field.

TABLE 10

PERCENT OF TOTAL ENLISTED POSITIONS FILLED BY WOMEN
BY OCCUPATIONAL GROUP AT END FY 76

OCCUPATIONAL GROUP	ARMY	NAVY	USMC	USAF **	DOD
0 Infantry, Gun Crew, Seamanship	0	0	0	0	0
1 Elec. Equipment Repair	2	1	1	3	2
2 Communications and Intelligence	10	7	1	7	8
3 Medical and Dental	22	14	*	16	18
4 Other Technical	6	8	3	4	5
5 Administrative and Clerical	13	11	7	11	11
6 Electrical/Mecahnical Repair	2	0	0	3	1
7 Craftsmen	2	0	2	2	1
8 Service and Supply	6	2	1	4	4
9 Other	8	6	2	12	8
TOTAL	6	4	2	6	5

* Covered by Naval Personnel.
** Air Force has readjusted the conversion of AFSC to DoD occupational codes, reducing the number of people in administration and increasing the number in other occupations, subsequent to the effective date of this table.
SOURCE: MARDAC Rum 3036.

The data in Table 10 do not lead to the conclusion that there are too many women, even in the traditional women occupations.

The limits on the use of women are associated with policies, which, for example:

(1) Prohibit women from specific types of units, e.g., combat units and ships.

(2) Limit or restrict the assignment of women in units in certain locations.

(3) Disallow the assignment of women to certain stations because of the lack of living facilities which provide appropriate separation of men and women.

(4) Reserve positions to protect a rotation base to provide alternative assignments for men who have filled positions at sea or overseas.

These service-specific limitations will be discussed in the sections on each Service, pages 31 through 46.

Potential to Use Women

The Services were asked to submit data from their 1977 manpower programs to permit the evaluation of the potential to use women. Table 11 summarizes part of that submission. A complete definition of the entries in Table 11 is included in the original request for data, included in Appendix A.

TABLE 11

SERVICE DATA SUBMISSION ON POTENTIAL USE OF WOMEN

Enlisted Positions and Strengths (000s)

(Lines A through I are Structure Spaces*)

	Positions Authorized for 30 September 1977	Army	Navy	Air Force	Marine Corps	DoD Total
A	Total Positions (less Individuals)	566.6	381.8	415.3	137.8	1,501.5
B/C	Combat and Combat Support	281.0	229.9	27.4	100.1	638.4
D	Net A-(B/C)	285.6	151.9	387.9	37.7	863.1
E	Rotation Base	23.3	84.2	0	28.4	135.9
F	Physiological Limits	0	0	0	0	0
G	Other Limits	217.0	38.0	72.1	2.4	339.5
H	Open to Women H-D-(E+F+G)	45.2	29.7	315.8	6.9	397.6
I	Women in Structure Spaces	35.3	15.8**	29.7	2.4	85.7
	Lines J and K are total women (including Individuals)					
	Strength					
J	Women on 30 Sept. 1976	44.4	19.3	31.0	3.1	97.8
K	Women Planned FY 1982	50.4	28.5	48.2	6.7	131.8

* Transients, patients and prisoners, students and trainees are excluded from structure spaces and carried as "Individuals". They are excluded from lines A through I, but included in total people in lines J and K.

** Navy data was adjusted for Individuals based on service-wide rate of 5% for TPP and 13% for students and trainees.

Line "A" represents the total number of structure enlisted positions. Structure positions are the manpower positions in units. They exclude transients, prisoners, patients under treatment, students, and trainees. Line "A" represents the base of positions for both men and women.

Line "B/C" contains the positions designated by the Services as combat or combat support from which women are excluded under present policies. Line "D" (line "A" minus line "B/C") is the net positions which theoretically could be available to women. Notice the differences between the Services in the relative numbers of spaces available after the exclusion of the combat positions. In the Air Force, 93% of the positions are available. The Army has 50% available and the Navy 40%. The Marine Corps has only 27%. The combat unit structure, with the associated restrictions, creates the largest difference in the relative number of women which the various Services could accommodate effectively.

Positions must be provided in the United States for men who must serve aboard ship or in "men-only" overseas units. These positions are called the rotation base. Some of these rotation base positions will be in combat units in the United States, which also exclude women; but there are not enough of these positions. Additional non-combat positions must be reserved for rotation. These are positions which could be filled with women if it were not for this rotation base problem. Line "E" shows the total number of these non-combat positions which are reserved for men for rotation base reasons which otherwise could be filled by either men or women.

The difference among the Services is very marked. The Air Force has identified no need for such non-combat rotational positions at this time. In the Army, they represent 8% of the positions which remain after the exclusion for combat and combat support. In the Navy and Marine Corps, the rotation base is a major factor. For the Navy, it represents 55% of the positions remaining after the combat exclusion; and for the Marine Corps, it is 75% of the positions remaining after the combat exclusion.

In line "F" the Services were asked to identify those positions closed to women for physiological reasons, such as stature or strength. While lack of strength is raised by the Service leaders as the most common problem in expanding the use of enlisted women, no positions were identified in the Service submissions as being closed to women for physiological reasons. This area needs attention.

The Services each have other restrictions which are applied to further limit the number of positions open to women. The extent of these limitations is shown in line "G". It is largest for the Army, at 217,000 positions or 76% of the positions which remained after the combat exclusion. Limitations on the concentration of women in various units and personnel management constraints are the major limiting factors in the Army. These exclusions are discussed in more detail in the Army Section of Service Analysis, pages 31 through 37.

The Air Force precludes women from about 45% of its overseas authorizations or 72,000 positions because of inadequate facilities at those locations to accommodate unmarried women. Lack of separation of men and women is the major problem. For example, the Air Force considers living quarters where men and women share the same hall as unacc ptable. Facility limitations are the largest single limitation to the number of women serving in the Air Force.

The Navy limits 38,000 additional spaces for reasons similar to both the Army and Air Force. They have some limits on overseas facilities, and they have skills with disproportionately small number of junior positions ashore. The Marine Corps limits an additional 2,400 positions for similar reasons.

Line "H" shows the number of positions which are open to women, based on the Service submissions. It should not be interpreted as the number of positions that should be filled by women—the numbers in line "H" appear to be more than the number of women the Air Force should have, and fewer than the Army should have. These problems will be discussed later.

Line "I" shows the number of women serving in such structure spaces. A comparison of lines "H" and "I" indicates some measure of what the Services consider the potential for growth in the use of women.

From this analysis the Air Force would appear to have a tremendous potential to use women, up to 315,800 in structure positions, plus TPP, students and trainees. The Air Force has progressed well in opening positions to women, increasing from 5,000 in 1966 to 29,000 in 1976. In addition, the Air Force is developing sexless criteria to insure that people, male or female, can perform the functions of specific positions. Work is progressing in developing standards for strength which will exclude many women and some men from those positions where such strength is essential. Such positions are not closed to women, but cannot be filled by many women.

An additional limit to the rate of increase of women in the Air Force is Service reluctance to create personnel management distortions by making very large changes in the number of women accessions over short periods of time.

The Marine Corps has room for growth. As noted previously, the Marine Corps did not have the rapid increase in women experienced by the other Services in the first half of this decade.

Line "J" shows the total number of enlisted women in each Service at beginning of fiscal year 1977, and line "K" shows the planned strength at the end of fiscal year 1982. These numbers include students, trainees, transients, patients and prisoners. The Marine Corps is planning a major growth during this period more than doubling the number of enlisted women marines. The other Services are planning more moderate growth. The Air Force plan calls for 55% growth, the Navy for 48% growth, and the Army for a 14% growth through 1982.[1] These rates are consistent with the limitations used by the Services as

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[1] As shown in Table 1, Army has the highest percentage of enlisted women of any Service; and the Air Force has had the highest growth rate since 1966.

shown in Table 12. Significantly larger growth rates would require restructuring the current limiting policies of the Services. Such possible changes are discussed in the individual Service sections beginning on page 31.

Table 12 shows the actual number of enlisted women for end of fiscal year 1976 and the end of the transition quarter and the annual projected end strengths through 1982 from the March Service submissions.

TABLE 12

ENLISTED WOMEN BY SERVICE IN THOUSANDS

	Actual		Projected					
	FY 76	FY TQ	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
Army	43.8	44.4	46.3	48.4	50.4	50.4	50.4	50.4
Navy	19.3	19.3	20.1	20.5	22.5	24.7	26.4	28.5
Air Force	29.2	31.0	34.6	40.2	42.3	44.3	46.3	48.2
Marine Corps	3.1	3.1	3.5	3.7	4.6	5.3	5.8	6.7
TOTAL	95.4	97.8	104.5	112.7	119.7	124.6	128.8	133.8

Table 12 contains the strength based on latest accession plans submitted in response to a request for data for this study. Navy, Air Force, and Marine Corps plans have undergone major changes during the last year. The Navy and Marine Corps have increased while the projection of the number of female accessions in the Air Force through 1982 has been revised downwards, as explained in the next section.

Accession Plan

In May 1976 the Services submitted program objective memoranda (POMs) for fiscal years 1978–1982. Among the data submitted were accession programs. Following development of the President's budget for fiscal year 1978, the five year defense plan (FYDP) was updated. It contains the accession plan to support the strengths in the President's budget.

Both the POMs and the FYDPs contain accession data to support their enlisted women strengths. Table 13 compares by Service the data in the May 1976 POM and January 1977 FYDP with the strength and associated accessions for the Service proposals submitted in March 1977 for this study.

TABLE 13

ENLISTED WOMEN STRENGTH (STR) AND ACCESSION (ACC) PLANS
BY FISCAL YEAR IN THOUSANDS

	FY 77		FY 78		FY 79		FY 80		FY 81		FY 82	
	Str	Acc	Str	Acc	Str	Acc	Str	Acc	Str	Acc	Str	Acc
ARMY												
MAY 76 POM	47.3	17.5	47.4	14.1	50.4	17.4	50.4	16.0	50.4	15.3	50.4	16.0
JAN 77 FYDP	46.3	14.6	48.3	14.5	50.4	14.4	50.4	13.5	50.4	13.5	50.4	13.6
March 77 Plan	46.3	15.8	48.4	15.6	50.4	15.5	50.4	14.6	50.4	14.6	50.4	14.7
NAVY												
MAY 76 POM	19.8	4.4	20.3	4.2	20.5	4.2	20.6	4.2	21.2	4.2	21.2	4.2
JAN 77 FYDP	19.8	4.4	20.1	4.2	20.1	4.2	20.1	4.2	20.1	4.2	20.1	4.2
March 77 Plan	19.8	4.4	20.5	4.8	22.5	5.6	24.7	6.0	26.4	6.0	28.5	6.5
AIR FORCE												
MAY 76 POM	34.3	10.0	42.4	13.0	51.4	13.6	60.1	13.9	67.5	12.8	74.8	12.8
JAN 77 FYDP	34.6	10.0	40.2	13.1	47.6	13.8	54.7	13.8	60.1	12.0	65.8	12.0
March 77 Plan	34.6	10.0	40.2	13.1	42.3	8.1	44.3	7.7	46.3	8.1	48.2	8.1
MARINE CORPS												
MAY 76 POM	3.4	1.3	3.5	1.3	3.6	1.3	3.7	1.3	3.7	1.3	3.7	1.3
JAN 77 FYDP	3.5	1.5	3.7	2.3	4.6	2.3	5.3	2.3	5.8	3.0	6.7	3.0
March 77 Plan	3.5	1.5	3.7	2.3	4.6	2.3	5.3	2.3	5.8	3.0	6.7	3.0

The Army has consistently moved toward a goal of 50,400 enlisted women, although their estimate of accessions required to achieve that goal has changed with the different submissions.

The Navy March plan represents a major increase above previous proposals. The Marine Corps significantly expanded the number of women they plan to have between the POM submission and the FYDP.

The Air Force, however, is moving in the opposite direction. Each of their successive submissions has lowered both the planned female enlisted strength and accessions.

The Air Force derived their POM and FYDP figures, which are considerably higher than the Air Force's current plan, using straight-line projections of FY 1978 procurement rates. Subsequent changes in female procurement percentages and revised loss rates led to the adjustment in female accession levels shown in their current proposal.

The Market

Questions concerning market conditions arise as the Services consider using increasing numbers of women. How many young women would enlist in the military services? Do these women want to enter non-traditional skills, or do they desire employment in the more traditional areas? Would expanding non-traditional jobs or opening shipboard service to women increase or decrease the number of women desiring to enlist in the Navy? These questions are of importance to the Department of Defense as we consider expanding the numbers of women being used in the military, and the areas in which they may serve. At present, we really do not know the answers. However, a recent study indicates that, while women enlist in the Navy for about the same reasons that men do, many may become dissatisfied with non-traditional jobs.[1]

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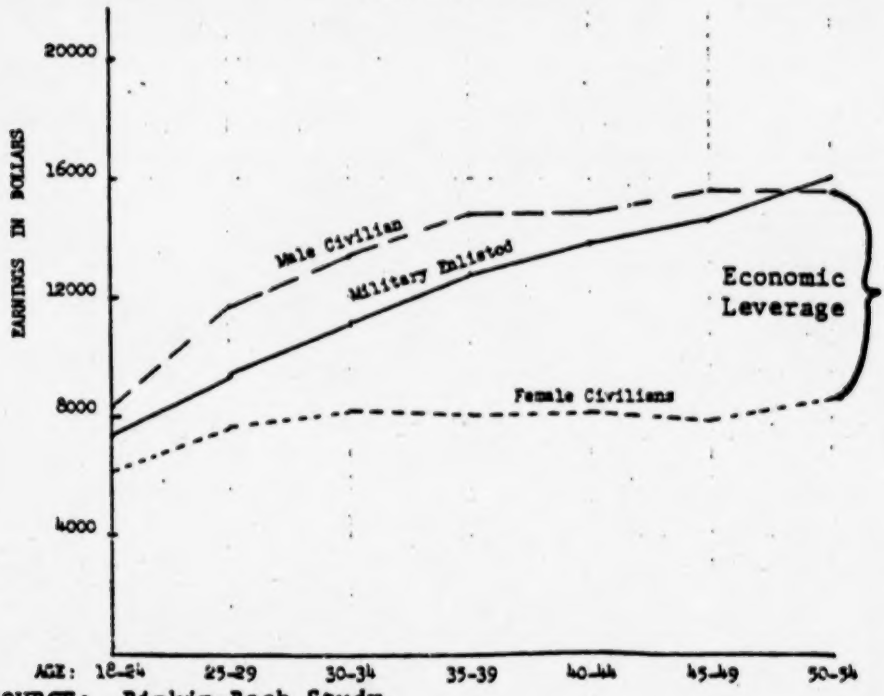
[1] Patricia J. Thomas, *Why Women Enlist: The Navy As An Occupational Choice*, San Diego, California, Naval Personnel Research and Development Center, March 1977.

To date, with the exception of the Korean War experience discussed in the background section, the Services have been able to fill the positions open to women with high quality recruits with a minimum of effort. There has been little market analysis and little effort to stimulate female accessions. One reason for the ease in recruiting women may be the relative advantage which the military enjoys in the job market for women.

Martin Binkin and Shirley Bach of the Brookings Institution in their study of women and the military argue that the Services have strong economic leverage in competing for women. As shown on Chart #1, the military compensation is considerably higher than the annual earnings of the average high school graduate woman who works full-time, year around.

CHART 1

Comparison of Mean Annual Earnings of Civilian Year-round, Full-time Wage and Salary Workers with at Least Four Years of High School but Less than Four Years of College by Sex and Age, and Military Enlisted Personnel by Age, Calendar Year 1975



SOURCE: Binkin-Bach Study.

The military women are paid the same as military men. As shown previously in this paper, women are promoted at the same rates as their male cohorts. The above chart shows that there is a considerable difference in the compensation of civilian men and civilian women who are high school graduates (but not college graduates), and who are full-time, year-round employees. This difference between civilian and military pay places the Services in a much stronger position in the labor market when competing for women than when competing for men.

The experience of the Services in recruiting women to date and the Binkin-Bach economic analysis would seem to indicate that there should be an ample supply of high quality women desiring to enter the military to meet the levels of growth projected by the Services or even for considerable increases to those levels.

The questions raised in the beginning of this section, however, form a basis of research which is needed to determine the market potential should major policy changes increase the demand for women many-fold or should policies change to require women to serve part of their career in combat units or aboard ship.

Quality of Accessions

Table 14 compares the average male and female accessions by service for a series of relevant characteristics.

TABLE 14

CHARACTERISTICS OF MALE AND FEMALE RECRUITS, FISCAL YEARS 1973-76, BY SERVICE

Characteristic	Army		Navy		Marine Corps		Air Force		Dept. of Defense	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Average age*	19.1	20.2	18.6	19.8	18.5	19.3	19.1	20.0	18.9	20.0
Percent married	14.0	14.0	6.1	4.4	5.2	1.4	17.1	13.7	11.6	11.6
Percent black	23.9	19.0	10.4	10.1	19.9	16.2	14.0	15.3	18.5	16.1
Percent high school graduates	54.1	88.4	70.4	98.6	48.0	90.9	85.8	93.0	62.9	91.7
Average test score**	51.8	73.2	58.2	82.9	56.1	86.7	62.3	82.7	55.8	86.0
Percent on Active Duty 30 June 1976	58	68	67	70	65	58	73	74	64	70

* Prior to 1975 young women had more restrictive age limits than men.
** Percentile (50 is average) on the armed forces entrance test.

The average female recruit was about a year older than her male counterpart. They had the same propensity to be married. She was less likely to be black (16.1% versus 18.5%), and much more likely to have graduated from high school (91.7% compared with 62.9%). She scored about ten points higher on the entrance tests. Seventy percent of the women accessions during the period were still on active

duty at the end of June 1976, as compared with 64% of the male accessions. Only in the Marine Corps was the percentage of women accessions on active duty lower than for the men.

The best known indicator of prospective success in the military is the possession of a high school diploma. Table 15 compares the percentage of male and female recruits who had high school diplomas when they enlisted.

TABLE 15

PROPORTION OF ENLISTED NON-PRIOR SERVICE RECRUITS WITH A HIGH SCHOOL DIPLOMA BY SEX, FISCAL YEARS 1971 TO 1976

	Fiscal Years					
	1971	1972	1973	1974	1975	1976
Male Recruits	68.3	66.8	65.5	58.1	52.5	66.7
Female Recruits	93.9	94.4	95.2	91.7	90.6	91.1
TOTAL RECRUITS	68.9	67.8	66.9	60.8	65.0	68.7

From Tables 14 and 15, it is obvious that the average women recruit is brighter and more likely to have a high school diploma than the average male recruit. The comparison favors women even more when we compare recruits at the margin, the lowest quality male recruits and the women who would replace them. The marginal male recruit is either a mental group IV or a high school dropout. He could be replaced by a woman who is much more likely than he to be a high school graduate with an average or better test score. This conclusion is especially true for the Army.

As male recruiting pressure tightens, these differences in quality between the marginal male and female accession can be expected to widen further.

Cost Comparisons

Pay of men and women in the military is the same if they are of the same grade and longevity, have the same skills, are in the same dependency status, and have similar access to public quarters and messing facilities. In other words, the military provides equal pay to similar people

whether they are male or female. In the past, women tended to cost less than men, because more of them were unmarried. As shown in Table 14, now about 11% of both men and women recruits are married. Higher medical costs for the dependents of men tend to be balanced by the higher medical costs of women on active duty. On balance, the cost of men and women on active duty is about the same.

The marginal cost of recruiting represents a major difference in the cost of men and women. In order to obtain sufficient numbers of young men who have graduated from high school and test average or above on the entrance tests, the Services each maintain large recruiting and advertising programs. These recruiting and advertising programs attract more high quality women and lower quality men than are presently used. Assuming that there is no additional cost to attract women or lower quality men, the following are the comparative marginal costs for men and women, excluding enlistment bonuses:

TABLE 16

MARGINAL COST OF RECRUITING*

	Army	Navy	Marine Corps	Air Force
High Quality Men	$3,700	$1,950	$2,050	$870
High Quality Women	$ 150	$ 150	$ 150	$150
Lower Quality Men	$ 150	$ 150	$ 150	$150

* Excludes enlistment bonuses.

Enlistment bonuses are now paid predominately to people entering the combat arms in the Army and Marine Corps. While women will liberate men to serve in combat arms, it is not clear that the bonus will cease to be necessary. But without increased numbers of women, the cost of attracting current levels of male high school graduates could increase markedly. The enlistment bonuses for 1976 were $68.5 million and for 1977 will cost $54 million. For 1978 they are estimated to cost $75 million. The requirement to recruit about 225,000 male high school graduates

from a shrinking population base could drive bonus costs up rapidly, conceivably by over $1 billion per year.

Martin Binkin and Shirley Bach, in chapter 6 of their Brookings study, estimated that maintaining the 1976 level of 225,000 male high school graduates could cost upwards to $6 billion more per year by 1982, if the number of women accessions is not increased and if the Services should attempt to use across the board military pay increases to attract sufficient numbers of young men. This $6 billion figure assumes pay raise increases to all military personnel in order to meet the cost of the marginal recruit. Selective enlistment bonuses could produce similar results for considerably less; but, as shown above, even such bonuses could result in increases of more than a billion dollars. If women can do enough of the jobs which must be done, considerable savings can be realized.

Women accessions may be used either to upgrade the quality of the force by recruiting high quality women in lieu of low quality men at the same cost or to save costs by replacing high school graduate men with women of the same quality for lower recruiting costs and avoidance of future increases in enlistment bonuses.

Binkin and Bach, after a rather detailed analysis, concluded their cost chapter with the following observation: "Far and away the most important financial consequence of increasing the proportion of women in the military . . . is the prospect of being able to maintain desired quality standards among volunteers without incurring large increases in military payroll . . . Indeed, whether or not this nation can sustain its armed forces solely by voluntary means could well depend on how effectively the female labor resource is employed."

In addition to the costs discussed above, there are other costs, difficult to quantify, associated with more women in the military. These costs include:

- Reduced performance because of physical differences
- Lost time for pregnancy and abortions

- Restrictions on deployability
- Sociological limitations on use of women in combat.

Physical Differences

In many jobs in the military, physical characteristics are important. Table 17 compares the height and weight of 18 year old men and women.

TABLE 17

COMPARISON OF PHYSICAL STATURE OF 18 YEAR OLD MEN AND WOMEN

Percent at or Exceeding the Measurement	Height (Feet and Inches)		Weight (Pounds)	
	Men	Women	Men	Women
5%	6'2"	5'8"	212	183
10%	6'1"	5'7"	196	160
25%	6'0"	5'6"	168	140
50%	5'10"	5'4"	152	126
75%	5'8"	5'2"	139	115
90%	5'6"	5'1"	128	105
95%	5'5"	5'0"	119	100

SOURCE: National Center for Health Statistics, Monthly Vital Statistics Report, (HRA) 76-1120, Vol. 25, No. 3, Supplement, U.S. Department of Health, Education and Welfare, June 22, 1976.

As shown in Table 17 above, only 5% of the 18 year old women are as tall as 75% of the men of the same age, while 95% of such men are taller than the average woman. Over 90% of the men weigh more than the average woman. Of women age 18 to 24, about 30% have a sitting height of less than 31.9 inches and about 50% have a popliteal height of less than 16 inches. Both of these measures are less than the measurement of 95% of men in the same age group.[1] Women have about 67% of the endurance of men and 55% of the muscular strength of men.[2] Even when size is held coustant, women are only 80% as strong

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[1] U.S. Public Health Service (Department of Health, Education and Welfare) *Weight, Height and Body Dimensions of Adults, United States 1960-1962*, Series 11, No. 8, June 1965, pp. 26-31.

[2] Jean D. Watheys, M.D., "Women in the Work Environment", Paper presented to Annual Meeting of the Academy of Occupational Medicine, San Francisco, California, March 1974.

as men.[3] An Army study showed that women undergoing a physical training program similar to that of men improved in physical strength only 24% as compared to 50% for men.[4] There are other physiological differences, such as the ability to tolerate extremes in heat and cold where women seem to be at a relative disadvantage.[5]

American women are generally smaller than American men. Oriental men also tend to be smaller than American men. Many of the problems faced in using more women in non-traditional positions in our armed forces were also faced in adapting equipment and procedures for the use of allied forces with men who are generally smaller than American men. The problems are not insurmountable, but the reality of these physiological differences should not be wished away in our efforts to avoid sexual discrimination or to substitute women for men in sustaining the all-volunteer force.

In some positions in the military these physiological differences may be a disadvantage and in others an advantage. Positions which require muscular strength above the level expected of many women should only be filled by people possessing the required strength. The Air Force is leading the way in developing tests of strength to be used to classify positions and be sure that either men or women who are assigned to such positions possess the needed strength. About 28% of the women tested by the Air Force could lift 70 pounds to a height of six feet, which was the most stringent test. Virtually all women tested could lift 40 pounds to elbow height. This criteria would

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[3] James A. Peterson, PhD., "Physiological Differences Between Men and Women", Unpublished.

[4] *Project 60: A Comparison of Two Types of Physical Training Programs on Performaning of 16-18 Year Old Women*, U.S. Military Academy, West Point, New York, 1976.

[5] Richard L. Burse, et al, *Differences Between Males and Females of Military Age and Their Physiological Response to Cold and Heat Environments*, U.S. Army Research Institute of Environmental Medicine, 1975.

meet the strength needs of most non-combat jobs in the military.

By the time all of the latest equipment is installed, many of our ships, aircraft, land vehicles and other facilities become very cramped for space. We may be able to take advantage of the smaller size of women in manning such positions. However, the size differences could require redesign of various equipment to permit women to operate the equipment effectively and safely. This area may need considerable attention if more women are brought into the Service.

Lost Time

Lost time due to pregnancy, menstruation and abortion are often cited as inefficiencies associated with women. All of the evidence indicates that very little time is lost for menstruation by healthy women with good physical fitness. Pregnancy does account for considerable lost time.

The Army collected data during fiscal year 1976. For pregnancies terminated in abortion, the lost time approximates that of a minor illness, averaging 10–12 days, including 4.8 days of hospitalization.

According to the Army, approximately 8% of the women become pregnant each year and 5.4% of the women on active duty go to term and deliver a child each year. The average pregnancy carried to term causes 105 days lost time or 29% of a manyear. At any given time, 3.8% of the women can be expected to be pregnant or on postnatal convalescent leave. For the Army, some 40% of the women giving birth on active duty request release from active duty after postnatal leave.[1]

The Air Force reported similar results with approximately 8% of their women becoming pregnant each year. The Air Force reported that women have about twice the lost time as men due to medical absence.[2] Much of this lost time is due to pregnancy and related female medical care.

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[1] Women in the Army Study, Chapter 7.

[2] Biometrics Report No. 114.

The pregnancy problem is similar in the Navy and Marine Corps, but the Navy pointed out that lost time due to pregnancy and abortion should be weighed in the context of total lost time. Table 18 compares major lost time categories in the Navy for enlisted men and women.

TABLE 18

COMPARISON OF LOST TIME FOR ENLISTED MEN AND WOMEN IN THE NAVY

Lost Time Category	Lost Days as a % of Total Days Available	
	Women	Men
Alcohol Abuse	.09	.12
Drug Use	.02	.12
Unauthorized Absence (AWOL)	.05	.24
Returned Deserters	.07	.62
Abortion	.03	0
Pregnancy	.37	0
TOTAL	.63	1.10

Even though pregnancy is the major cause of lost time among women, they lose, on the average, only about half as much time as men. Men's lost time to desertion, alcoholism and drug abuse tend to result in the loss of several consecutive months, similar to pregnancy. Lost time for unauthorized absence is usually a matter of days lost, as is abortion. However, both desertions and unauthorized absences may correlate with unpleasantness of an individual's jobs. Women are less likely to be in such jobs than men, especially in the Navy. All Services are initiating studies of comparative lost time for men and women.

Deployability

Each Service has found that long periods of consecutive lost time hurt unit effectiveness and reduce the deployability of a unit. Should a unit need to deploy rapidly in an undermanned condition, it would be less capable of performing its mission.

While about 40% of all military women who become pregnant on active duty and go to term request early release, 60% continue to serve with small children. The Services believe that these women require more special

considerations than most women without children or most men. They are often limited in the hours they can work and are restricted in attending field maneuvers and other special demands. Perhaps most serious is the limitations on deploying these women in case of national emergency.

Air Force data indicate that 14,000 or 40% of the women in the Air Force are married to military men. Often they are assigned to the same unit or at least the same base. When they have children, there is a real limitation on the deployability of both parents. Other men and women are the sole custodians of small children. They are also limited in their work assignments and, especially, in deployment during national emergency. These are important limitations which need more study and documentation to determine the potential impact on our current readiness and our responsiveness in case of national emergency. They are under review by all of the Services and the Office of the Secretary of Defense.

Combat Restrictions

There are sociological limitations on the use of women in combat. As the Women in the Army Study points outs, women have fought well in various countries during periods of intense national crises; but today no major nation has women in combat jobs in their standing Army—not even Israel. As more women are recruited, this restriction becomes increasingly relevant. Support people in peacetime often become combatants when a war breaks out. If a significant proportion of our peacetime force cannot make that transition, we may face serious shortages in early periods of a major conflict.

This problem can be minimized somewhat by reconsidering what is combat. Leading a bayonet charge is different from launching an ICBM from the United States or operating a fire control system for artillery behind the lines. There is a difference between the first wave of an amphibious invasion and controlling aircraft from an aircraft carrier or typing correspondence on a fleet oiler. Ground combat is fought under particularly harsh conditions. We are just beginning to assess the impact of field

conditions on women. We need to reexamine the positions which are now closed to women because of the combat criteria, but we also need to look at the limits on flexibility which growing numbers of women impose on our ability to mobilize and fight a sustained conflict.

Summary

This general analysis has examined the threefold increase in female enlisted personnel which has occured since 1972, and concludes that women are concentrated in traditional skills, but are found in significant numbers in all of the non-combat skills. Women are promoted at least as rapidly as men, and now have slightly lower attrition rates than men during their initial enlistment. Women have a higher propensity to leave non-traditional occupations, and a higher propensity to remain in the more traditional ones.

Except for the Army, all of the Services plan to continue increasing the number of women. The Marine Corps plans to more than double the number of enlisted women from 1976 to end 1982, while the Air Force plans a 55% increase and the Navy expects a 48% increase over the same period. The Army is planning an increase of only 14% over the next five years, with no increase in enlisted women after reaching 50,400 in 1979.

There appears to be an adequate market of high quality women available to meet the growth patterns expected and probably to provide for a significantly larger demand. The average female accession in recent years compares very favorably with the average male recruit, and the marginal woman available to be recruited would appear to be of much higher quality than the marginal man she would replace.

The marginal cost of recruiting high quality men is significantly higher than for high quality women. The marginal cost difference is greatest in the Army and least in the Air Force. The cost avoidance of not placing excessive demand on the market for bright young male high school graduates may exceed $1 billion per year by 1982.

The nation may not be able to afford to use military pay increases to continue to attract such large numbers of young male high school graduates. The success of the volunteer force may well depend on the number of young women who join the military and how they are used.

SERVICE ANALYSIS

On January 27, 1977, the Secretary of Defense directed the ASD(M&RA) to undertake a priority analysis of the use of women in the military, as part of a larger analysis of military manpower utilization. The Services were asked to assist the analysis by:

(1) Providing data for their FY 1977 force structure on total positions, positions closed to women because of combat restrictions, non-combat positions closed because of rotation requirements for men filling combat positions, and non-combat positions closed to women for other reasons.

(2) Structuring and evaluating an alternative that would double the number of women from June 30, 1976 to September 1982.

(3) Discussing known limitations on the supply of women.

(4) Providing comparative data on performance of integrated units with similar "male only" units.

(5) Discussing other pertinent problems.

The tasking memorandum is at Appendix A. The following four sections summarize the data submitted by the Services and discuss Service-specific problems. One section is devoted to each Service.

Army

The Army submitted more information than any of the other Services. They have experienced the largest growth in both the number and percentage of women in the last five years and have devoted considerable study effort to the use of additional women during the past year. The Army needs more recruits than any other Service and is

very sensitive to the need for quality accessions in the all-volunteer force environment.

The Army is currently in a planned expansion of women, driving toward a goal of 50,400 enlisted women by the end of fiscal year 1979. They argue strongly in their submission that they should not be forced to increase above that level of enlisted women until they have evaluated the impact of such increases. The Army presentation is quoted at Appendix B. The Army does project gradual increases in women officers. Table 19 shows the Army's March, 1977 plan.

TABLE 19

TOTAL NUMBER OF ARMY WOMEN ON ACTIVE DUTY AT END FY (000)
(MARCH, 1977 PLAN)

	Actual		Projected					
	FY 76	FY TQ	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
Officers	4.8	5.1	5.9	6.7	7.3	7.9	8.5	9.0
Enlisted	43.9	44.4	46.3	48.4	50.4	50.4	50.4	50.4
TOTAL	48.7	49.5	52.2	55.1	57.7	58.3	58.9	59.4

An examination of both the alternative plan and the Army's current plan shows an intention to increase women officers by a higher percentage than enlisted women. The alternative plan would be almost triple the number of women officers who were in the Army on 30 September 1976, while increasing enlisted women by 91%. The Army's current plan would increase women officers by 76% and enlisted women by only 14%.

Table 20 summarizes the Army data submission on the current force structure. (The meaning of rows A through I are discussed on pages 15–17.)

TABLE 20

SUMMARY OF ARMY DATA SUBMISSION
(000s)

	Enlisted	Officer	Total
Positions Authorized for End FY 77			
A Total Military Structure Positions	566.6	85.6	652.2
B Combat Unit Spaces	260.9	21.3	282.2
C Combat Support Unit Spaces	20.1	9.3	29.4
D Remainder A-(B+C)	285.6	55.0	340.6
E Rotation Base	23.3	2.5	25.8
F Physiological Limits	0	0	0
G Other Limits	217.0	38.7	255.7
H Open to Women Net D-(E+F+G)	45.2	13.8	59.0
Strength			
I Actual Strength 30 Sept. 1976			
a. Operating Strength	35.3	4.1	39.4
b. Non-Operating Strength (individuals)	9.1	1.0	10.1
c. Total	44.4	5.1	49.5

NOTE: Structure positions should be compared with operating strength rather than total strength.

Line "H" from the enlisted column of Table 20 shows an Army estimate of 45,200 enlisted positions as the maximum number of women who should serve in structure positions of the Army. This corresponds to about 57,000 enlisted women when individual requirements are added.

Line "D" on Table 20 shows some 285,000 enlisted positions in the Army after the combat and combat support units are removed. The policies which reduce this 285,600 to 45,200 are central to the issue of increasing the number of enlisted women above the Army's proposed level of 50,400.

About 23,300 positions are closed to provide for rotation of men from overseas units where women are not assigned. The remaining reduction of 217,000 non-combat positions deserves special attention.

In April 1975 Army developed the limitations on the percentages of women in non-combat units shown in Table 21 and began manning to those levels in February 1976.

TABLE 21

LIMITS ON ARMY WOMEN IN NON-COMBAT UNITS

Type Unit	Maximum % Women
- Units which operate forward of brigade near boundry	0%
- Units operating between division and brigade rear	10%
- Units operating between corps and division rear	15 to 30%
- Units operating behind corps rear boundry	25 to 45%
- Units not expected to leave CONUS in an emergency	25 to 50%

Those percentages tend to control the number of women which the Army says it can use, because they are major parameters in the analysis the Army uses to determine the number of women accessions.

The Army parametric analysis follows a six step process outlined in more detail in Appendix B. It takes authorized enlisted positions by grade, skill and unit for the future force. It applies these limitations on women by type of unit and for excluded skills. Women are precluded from positions using the more restrictive of the two screens.

For example, there can be no woman in a unit which would operate in the brigade area and not more than 10% in a unit operating at division level. Certain skills, such as infantrymen, combat engineer, and hawk fire control crewman are excluded no matter where the unit might operate. (See Appendix B for a complete list of the 31 skills to be closed to women for combat reasons.) Both screens would be applied by MOS. The lower of the two numbers would be used.

These steps account for closing about 68,000 positions to enlisted women.

The results of these first steps of parametric analysis are inputted into the Army's Women Enlisted Expansion Model (WEEM). The WEEM applies further constraints on the number of positions open to women to insure that the positions provide for acceptable promotion, rotation, and management flexibility. The model is constructed to designate males over females. For example, E-3 clerk-

typist positions in Army combat units are filled by men. Clerk-typist positions in major command headquarters or at the Pentagon in grades E-4 or E-5 could be filled by women. Some of them, however, are designated for men, to provide promotion opportunity for the male clerk-typists in combat units. Positions open to women are reduced in a similar fashion in solving any promotion, rotation, or management problems. The WEEM is also outlined in Appendix B.

As the result of the WEEM, 13 additional skills are to be closed to enlisted women. They include Defense Acquisition Radar Crewman, closed because of career progression constraints, and Concrete Paving Equipment Operator, closed because of lack of entry positions. For the complete list, see Appendix B. Many other skills, while still open to women, were sharply curtailed by the WEEM analysis. In addition to the 23,300 enlisted positions closed because of rotation base, the WEEM precluded women from about 149,000 enlisted positions because of promotion and other management constraints.

The parametric analysis takes the output from the WEEM and adds people to cover transients, patients, prisoners, students, and trainees.

The final step of the parametric analysis applies the constraints of the Army's Enlisted Force Management Plan (EFMP) using the objective grade structure and expected continuation rates to determine how many female accessions would be needed to meet the positions expected by grade. Table 22 shows the current limits by grade.

TABLE 22

ARMY FEMALE ACCESSIONS CONSISTENT WITH FILLING ALL POSITIONS OPEN TO WOMEN IN A GIVEN GRADE

Grade	Accessions/Year
E2-4	10,900 - 13,700
E5	21,300 - 29,500
E6	18,400 - 29,000
E7	21,600 - 39,200
E8	19,300 - 33,400
E9	15,400 - 24,300

The table shows that 10,900–13,700 female accessions per year would fill all positions open to women in grades E–2 through E–4 with women, given expected continuation rates and promotion policies. Similarly, 21,300–29,500 female accessions per year would fill all positions open to women in grade E–5 (but would provide more women in grades E–2 through E–4 than there are positions open to them). For men, the largest limiting grade would be used. For women, the smallest limiting grade, E–2 through E–4, is used to set steady state annual female enlisted accessions between 10,900 and 13,700, or between six and eight percent of planned total enlisted accessions.

Small changes in the parameters, such as the percentage of women authorized in the field units could significantly increase the number of women who could be used in pay grades E–2 through E–4. Similarly, acceptable changes in the promotion, rotation, or management requirements for men by MOS could significantly increase the number of women which could be used, especially in the limiting pay grades of E–2 through E–4. If enough females E–2 through E–4 could be used, the number of women accessions could be nearly doubled, as shown in the grade limitations in Table 22. That would permit a female steady state strength in excess of 100,000.

The Army submitted a report entitled *Women in the Army Study*, dated December 1976, in support of their arguments against further increases in women. While the study represents considerable effort, it is incomplete in several respects. For example, an entire chapter is devoted to the lost time problems associated with pregnancy and sole parent dependency, but no mention is made of areas where women have better lost time records than men. No mention was made of the lower disciplinary problems of women or the greater lost time to men because of higher rates of desertion, AWOL, drug use and alcohol abuse. No mention was made of the higher retention rates for women shown earlier in this report, which also result in greater productive time per person. Women may have about the same total lost time as men on the

average; but, much more importantly, women would appear to have a propensity for much less lost time, than the low quality male accessions they would replace. The Army has initiated studies to obtain comparative data on lost time for men and women.

The Army is conducting tests which are showing interesting results. One such Army test, called Women Content in Units Test (MAX WAC), has been examining the performance of company level TOE units with various mixes of women. Preliminary results indicate that there is no significant difference in performance of units because of the percentage of women assigned. The tests will involve units with up to 35% women.

The Army has formed a steering group of general officers whose job it is to oversee the expansion of the number of women in the Army. The steering group also monitors ongoing programs. This group has cautioned the Army to be careful not to expand too rapidly and too far. They have also initiated a number of actions which have expanded the role of women in the Army, as the following examples indicate:

— Changing policy for command to permit women to command men.

— Causing enlistment options to be the same for men and women where feasible.

— Opening additional skill areas to women.

— Modifying overseas tour lengths to make them the same for men and women.

— Revising design criteria for barracks construction to make new barracks suitable for both men and women.

Martin Binkin and Shirley Bach in their study at the Brookings Institution entitled, Women and the Military, concluded that as many as 175,000 Army enlisted jobs could be filled by women without disrupting male career patterns, if women's assignments to non-combat jobs behind the brigade rear boundry were not restricted. The data submitted by the Army and summarized in the en-

listed column of Table 20. indicate that there are 285,000 non-combat enlisted positions in the Army. These are reduced to 54,000 enlisted positions for women by the parametric analysis discussed above. A more balanced approach to the personnel management constraints in the Army procedure would increase that 54,000 considerably. How much is not clear at this time, but the Binkin-Bach 175,000 number may not be an unreasonable upper limit.

If officers are considered as well as enlisted, the upper limit on the number of women which can ultimately be used in the present Army is probably between 59,000 and 200,000. It is clear from examining the Army's parametric analysis that the 8% enlisted accession rate for women associated with 59,000 women positions is over-controlled. Relatively small adjustments in the limits imposed from brigade through corps for deployable units, or wider tolerances for promotion, rotation, and management flexibility, could increase the Army limit to 80,000, including 68,000 enlisted. Tihs would permit enlisted female accessions of about 12% of total non-prior service enlisted accessions. Whether the correct number is 80,000 or 100,000 women or even the Binkin-Bach 200,000 women is not clear. Analysis of the impact on the Army as the number of women increase will be an important part of deciding that final number.

Table 23 summarizes the number of enlisted women in the Army after reaching steady state and the approximate percent of current enlisted accessions which would be necessary to reach and sustain those levels, under the various limiting cases discussed above:

TABLE 23

ALTERNATIVES FOR ENLISTED WOMEN IN THE ARMY

	Maximum Steady State Enlisted Women	Approximate Percent of Enlisted Accessions Which Would Need to be Female
Binkin-Bach Estimate	175,000	30%
Study Alternative Case	85,000	15%
Estimate from Adjustments	68,000	12%
Army Data*	57,000	9%
Army Plan	50,400	8%

* Table 20 adjusted for Individuals, see pages 32-33.

It will take the Army time to assimilate the four-fold increase it has made in women content in the last five years. Much of the problem in adjusting to women in new roles and units is psychological and requires some time for acceptance. The Army's approach is to move very slowly in the next few years.

Under the Army's plan to stabilize the number of enlisted women in the Army at 50,400, the number of accessions would actually drop from an FY 74-76 average of 16,400 per year to 14,900 in FY 79-82. This drop will occur as many of the current E-2 through E-4 women become more senior Non Commissioned Officers (NCOs). If the Army can use something near the current number of women in pay grades E-2 through E-4 each year, the overall number of enlisted women should be able to increase as more women become NCOs.

One solution to the women strength issue is to stabilize the annual female enlisted accession rate, and let the number of women in the Army grow gradually. As more experience is gained with these higher levels of female strength, accession plans could be reevaluated.

We have very little experience operating with high percentages of women. Even at the peak of World War II, the Army only had 2.2% women, compared to 6.5% on June 30,

1976. It appears the Army can use more enlisted women. They will help make the all-volunteer force succeed and will save money. But the growth must be watched to ensure that the fighting capability of the Army is strengthened, not weakened by additional enlisted women.

Navy

Table 24 summarizes the Navy data input from the 1977 force structure. (The meaning of rows A through I are discussed on pages 15–17.)

TABLE 24

SUMMARY OF NAVY DATA SUBMISSION (000s)

Positions Authorized for End FY 77	Enlisted	Officer	Total
A Total Structure Positions	381.8	53.7	435.5
B Spaces in Combat Units	229.9	16.1	248.5
C Spaces in Combat Support Units		2.6	
D Remainder A-(B+C)	151.9	35.1	187.0
E Rotation Base	84.2	3.8	87.9
F Physiological Limitations	0	0	0
G Other Limitations*	38.0	14.8	52.8
H Open to Women, Net D-(E+F+G)	29.7	16.5	46.2
Strength			
I Actual Strength 30 Sept. 1976**			
a. In structure positions***	15.8	3.3	19.1
b. Individuals	3.5	.3	3.8
c. Total	19.3	3.6	22.8

* Some of these positions are also restricted because of Section 5 of Title 10, which precludes women from assignment to ships of the Navy except hospital ships and transports.

** Enlisted strength was adjusted between individuals and structure positions based on total distribution for men and women.

*** Women in structure positions, line Ia, should be compared with net structure positions, line H.

From Table 24 it can be seen that two major factors limit the Navy in the number of women which can be employed.

First, positions in combat and combat support ships and aircraft squadrons are closed to women. Section 6015 of Title 10 precludes the assignment of women to combatant aircraft and ships, other than hospital ships and transports. Since the Navy has no hospital ships or transports, this provision of the law excludes women from all operational units except a few aircraft squadrons and tug boats. This restriction eliminated over 250,000 positions shown in lines B, C, and G, of Table 24.

Second, the rotation base to provide shore duty for the men who serve in positions aboard ship eliminates another 88,000 positions. Indirectly, these restrictions may also be attributed to Section 6015. If women could serve aboard ships, they could also serve in the rotation base supporting the positions aboard ships.

Thus the effect of Section 6015 is to exclude women from more than three-quarters of the positions in the Navy.

Many ships of the Navy could accommodate women easily. If Section 6015 were repealed, women could serve on support ships without being directly involved in combat. Even if women served on major combatants, in the same skills they now perform ashore, their risk in case of war would be little different than the risk to Navy women in some shore jobs.

For instance in Vietnam, the chance of the enemy inflicting wounds on a woman aircontroller in Danang or Saigon was probably higher than on a male aircontroller on an aircraft carrier operating at either Yankee or Dixie station. The chance of becoming a casualty in a major war with the USSR is probably as high for a woman yeoman assigned to the NATO headquarters in Brussels, as to the male yeoman assigned to a replenishment ship in the central Atlantic.

The Navy has submitted legislation to slightly modify 6015. Women could serve in vessels such as training and

research ships; but it would not permit women on auxiliaries such as oilers and replenishment ships or on combatants such as cruisers and aircraft carriers, except for temporary duty. It would open 2,000–3,000 positions to women. To make more significant changes, Section 6015 would need to be repealed or drastically modified.

Senator William Proximire proposed an amendment to the Military Procurement Authorization Act of 1978 on the floor of the Senate which would have implemented the Navy proposal and would have given the Secretary of Defense authority to determine which positions in the armed forces would be open to women. The Department of Defense supported that amendment. However, at the suggestion of Senator Sam Nunn, Senator Proxmire modified his amendment to direct the Secretary of Defense to study the issue and report within six months a definition of the term "combat" and make legislative recommendations. The Senate passed the modification.[1]

Table 25 shows the current Navy proposal.

TABLE 25

TOTAL NUMBER OF NAVY WOMEN ON ACTIVE DUTY AT END FY (000)
(MARCH, 1977 PLAN)

	Actual		Projected						
	FY 76	FY TQ	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
Officers	3.5	3.6	3.8	4.0	4.2	4.4	4.6	4.8	5.0
Enlisted	19.2	19.3	19.6	20.5	22.5	24.7	26.4	28.5	30.3
TOTAL	22.7	22.8	23.5	24.5	26.7	29.1	31.0	33.3	35.4

In Appendix C, the Navy presents a convincing argument that the expansion of the number of women should not exceed their plan, which would reach 35,400 women, including officers, by the end of fiscal year 1983.

The Navy states that their plan will use women to fill jobs ashore to the maximum extent feasible within lim-

[1]*Congressional Record*, 95th Congress, 1st Session, vol. 123, No. 84, May 17, 1977, S7785–S7790.

itations on male sea/shore rotation, force structure, and current female statistical information and modeling. The Navy also cautions that they know very little about the likelihood of certain women to stay in the Service—especially those in non-traditional skills.

There are some berthing problems which the Navy will have to identify and correct in order to meet their new plan. In addition, the Navy warns that it is not possible to quantify the impact of more women on unit effectiveness or personnel management. The reduction in positions ashore will have some adverse impact on male reenlistment. This is expected even in enlisted ratings that have more shore duty than sea duty. The extent of this impact is difficult to estimate. Additional discussion of these and related problems submitted by the Navy is provided in Appendix C.

Binkin and Bach estimate the Navy's potential to use enlisted women, to be 42,000, unless the current restrictions on sea assignment are removed.

Clearly the major action needed to provide better use of women in the Navy and permit them to make larger contributions to the defense effort of the Navy lies in obtaining repeal of Section 6015 of Title 10. In the meantime, the Navy's current plan, moving to 33,300 women by 1982 and 35,400 by 1983, appears to be near the maximum which can be expected as long as Section 6015 is in force.

Air Force

Table 26 presents a summary of the Air Force data submission. (The meaning of rows A through I are discussed on pages 15–17.)

TABLE 26

SUMMARY OF AIR FORCE DATA SUBMISSION (000s)

Positions Authorized for End FY 77		Enlisted	Officer	Total
A	Structure Positions	415.3	90.2	505.5
B	Combat Positions which Exclude Women)	27.4	36.3	63.7
C	Combat Support which Exclude Women)			
D	Remainder A-(B+C)	387.9	53.8	441.7
E	Rotation Base	0	0	0
F	Physiological Limits	0	0	0
G	Other Limits (Facilities)	72.1	*	72.2
H	Net D-(E+F+G)	315.8	53.8	369.6
Strength				
I	Actual Women 30 Sept. 1976			
	a. Women in Structure Positions	29.7	5.0	34.7
	b. Individual	1.2	*	1.2
	c. Total Women	31.0	5.0	36.0

* Less than 50.

NOTE: Women in structure positions, line Ia, should be compared with net spaces, line H.

Table 26 shows that there are more officer positions limited because of combat and combat support than enlisted. Unlike the other services, in the Air Force the officers carry the brunt of the combat duty. Aircrews are very officer intensive, and they are the ones who engage the enemy.

The only other constraint on the assignment of women is 72,000 enlisted positions overseas for which there are inadequate facilities for single women. This represents some 45% of such overseas enlisted authorizations. The Air Force has very strict rules on the joint use of facilities by men and women, which they believe are necessary for adequate privacy.

The Air Force has moved foward in providing equal opportunity for women within the constraints of Section 8549 of Title 10, which preclude women from serving in the crews of combat aircraft. Since the law was passed in 1948, the Air Force has considered all aircraft to be combat aircraft and has precluded women from serving on flight crews, although some women have served as flight attendants, especially on medevac flights. In 1976, the Air Force revised their interpretation of the law and initiated a test of women as pilots and navigators. The first group

of women entered flight training in September 1976. The results of this test will provide experience on which to base future policies and objectives concerning women in aircrew positions.

The Air Force also restricts women from serving on ICBM crews, because such positions are combat related. This represents less than 1% of the positions in the Air Force and will have little impact on the number of enlisted women the Air Force can use. However, it is a strict interpretation of combat exclusion.

As shown on Table 26, the Air Force has over 369,000 officer and enlisted positions which could be filled by women. Some of them require considerable physical strength, and thus disqualify most women. It is the Air Force policy to try to identify the restricting factor in non-sex criteria and permit any man or woman to fill the position, as long as he or she meets those criteria. For example, a position may require an individual to lift 70 pounds to a height of six feet. Women and men who can meet the requirement are equally eligible.

This procedure appears to be the best way to handle the problem, but it does invalidate use of the numbers on Line "H" of Table 26 to conclude how many women can be effectively used by the Air Force.

The Air Force, like the Army and Navy, has experienced rapid and large growth in the number of women, increasing from 16,000 in 1972 to over 38,000 at present. The Air Force plans to continue increasing the number of enlisted women, but at a slower pace than in recent years. Table 27 shows the Air Force's current plan.

TABLE 27

TOTAL NUMBER OF AIR FORCE WOMEN ON ACTIVE DUTY AT END FY (000)
(MARCH, 1977 PLAN)

	Actual		Projected					
	FY 76	FY TQ	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
Officers	4.8	5.0	5.4	5.8	6.5	7.2	7.9	8.6
Enlisted	29.2	31.0	34.6	40.2	42.3	44.3	46.3	48.2
TOTAL	34.0	36.0	40.0	46.0	48.8	51.5	54.2	56.8

The Air Force is currently in the middle of a major program to expand the number of women in the Air Force. The largest increase in end strength will occur in FY 1978, increasing the number of officer and enlisted women in the Air Force from 40,000 in 1977 to the 46,000 level in 1978. In response to the request for data for this study, the Air Force submitted their current plan, to be initiated in 1979, which continues to increase the number of women on active duty to reach 56,800 by 1982.

There appears to be considerable room for growth in the number of women in the Air Force. Binkin and Bach estimate a potential for the Air Force of up to 366,000 positions which could be filled by enlisted women. That would appear to be consistent with the findings of this study, but we would probably never want to fill all those positions with women. The major question is how fast should the number of women in the Air Force be increased.

There is a possible side benefit of reducing the number of high quality men recruited by the Air Force. Some of the high quality men not recruited by the Air Force will join one of the other Services into have more trouble recruiting sufficient numbers of such men. A 1973 study made in OSD(M&RA) estimated that one of every four qualified men rejected by the Air Force would join one of the other three Services. Weighed in terms of marginal recruiting costs, this does not represent very large savings. This spillover effect does not justify changing the number of women recruited by the Air Force. Any increase in Air Force women should be justified on the basis of its impact on the Air Force.

The Air Force arguments for its proposed growth plan are provided at Appendix D. Additional problems, including those related to pregnancy and women with small children are discussed as well. Again, it is clear that more information is needed on these subjects, as we move to larger numbers of women in the military.

Marine Corps

The data submitted by the Marine Corps is summarized in Table 28. (The meaning of rows A through I are discussed on pages 15–17.)

TABLE 28

SUMMARY OF MARINE CORPS DATA SUBMISSION (000s)

Positions Authroized for End FY 77		Enlisted	Officer	Total
A	Total Structure Positions	137.8	15.0	152.8
B	Combat (Fleet Marine Force)	98.8	8.5	107.3
C	Combat Support (Non-FMF)	1.3	.9	2.2
D	Remainder A-(B+C)	37.7	5.6	43.3
E	Rotation Base (not in B or C)	28.4	3.9	32.3
F	Physiological Limits	0	0	0
G	Other Limits	2.4	.4	2.8
H	Net D-(E+F+G)	6.9	.6	7.5
Strength				
I	Actual Strength 30 Sept. 1976			
	a. In Structure Positions	2.4	.4	2.8
	b. Individuals	.6	*	.7
	c. Total	3.1	.4	3.5

* Less than 50.

Many of the problems discussed in the Navy section concerning restrictions on shipboard duty under Section 6015 of Title 10 apply to the Marine Corps whose people are also expected to serve aboard ships. The Marine Corps included in the combat classification (line "B" of Table 28) all of the Force Troops of the Atlantic and Pacific Fleets, all the positions in the three Marine divisions, the three Marine air wings and the three Marine force service support groups. Future analysis should consider whether some of the positions in these organizations can be filled by women. Support units in Army divisions now have up to 10% women.

Under combat support in line "C" of Table 28, the Marine Corps included all of the remaining positions requiring infantry, artillery, tank and amphibian tractor and pilots and flight crews. All of these MOSs are closed to women.

As mentioned previously in the general analysis, the Marine Corps did not increase its percentage of women in the early 1970s as much as the other Services. The Marine Corps' current plan, which more than doubles the 1976 strength by 1982, is presented in Table 29.

TABLE 29

TOTAL NUMBER OF MARINE CORPS WOMEN ON ACTIVE DUTY AT END FY (000)
(MARCH, 1977 PLAN)

	Actual		Projected					
	FY 76	FY TQ	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
Officers	0.3	0.4	0.4	0.5	0.5	0.6	0.6	0.6
Enlisted	3.1	3.1	3.5	3.7	4.6	5.3	5.8	6.7
TOTAL	3.4	3.5	3.9	4.2	5.1	5.8	6.3	7.3

The Marine Corps has had more difficulty than any other Service in meeting recruiting goals. Numerical targets have been reduced to ensure acceptable quality. Recruiting more high quality women could help. On the other hand, it could exacerbate another problem the Marines have: Many Marines now face alternating overseas tours away from their families. If additional women were assigned primarily to positions in the United States, this rotational burden on men would be made worse. In moving from 3,400 military women in 1976 to 7,300 in 1982, the Marine Corps needs to find ways to relieve the rotation pressure on their men. If they do this, they may be able to use effectively more than 7,300 women.

Binkin and Bach estimate a potential of 15,000 women for the Marine Corps. That appears to be high, unless more positions can be made available to women in the divisions, wings, support groups and sea going forces.

The Marine Corps is still experiencing problems providing adequate billeting, since many of their barracks are not suited for the joint use of men and women. As the number of women increases, adjustments may be necessary in living facilities. Additional comments are in Appendix E.

This analysis of the Marine Corps indicates that they should not expand the number of women more rapidly than now planned.

CONCLUSIONS

During the past five years, all of the Services except the Marine Corps have increased the number of women several-fold. These increases have been made in spite of major reductions in the force structure and a shift of positions from support to combat units. The Marine Corps is now planning to more than double its number of women by 1982.

The Navy and the Air Force are planning more modest growth patterns over the next five years, but are still planning for 46% and 50% increases, respectively, by 1982.

The Army, which made the largest increases over the last five years, now has both a larger absolute number of women and a larger percentage of the positions in their force filled by women, than any other Service. The current Army plan, however, calls for only 20% growth over the next five years and much of that is concentrated in the officer ranks.

In view of the reduction in the number of young men expected in the labor market in the 1980s and 1990s, it would seem prudent that the Army should pursue a more ambitious program to find ways to use more high quality women to meet their enlisted requirements. It would appear that more realistic constraints in their personnel programs would permit significantly larger increases by 1982.

The cost of trying to maintain the current levels of male high school graduates could become prohibitive in the next few years.

During the course of this study it has become clear that there are still many unanswered questions, including:

— What are the costs in terms of flexibility, response to uncertainty, readiness, and deployability of having more women in the military who are precluded from combat service?

— What is the impact of women with small children on these factors?

— What is the comparative lost time of men and women?

— Will more or fewer women be willing to enlist, if they are required to serve in combat support units, aboard ships, or in non-traditional skills?

The maximum woman content for grade 5 is equal to the maximum woman content for grade 4 multiplied by the ratio derived from dividing the strength of grade 5 by grade 4. The process is repeated for each grade. *Step 11*—Total female positions available are computed by subtracting the current woman content from the maximum woman content.

Combat and Combat Support Skills Which Exclude Women

Taken from Annex A of Chapter 4 of the Women in the Army Study, Headquarters, Department of the Army, December 1976.

Combat/Combat Support Skills*

11B	Infantryman
11C	Infantry Indirect Fire Crewman
11D	Armor Reconnaissance Specialist
11E	Armor Crewman
11Z	Maneuver Combat Arms Sergeant
12B	Combat Engineer
12C	Bridge Specialist
12D	Powered Bridge Specialist
12E	Atomic Demolition Munition Specialist
12F	Combat Engineer Tracked Vehicle Crewman
12Z	Combat Engineer Senior Sergeant
13B	Field Artillery Crewman
13E	Field Artillery Cannon Operations/Fire Direction Assistant
**13W	Field Artillery Target Acquisition Senior Sergeant
**13Y	Cannon/Missile Senior Sergeant
13Z	Field Artillery Cannon Senior Sergeant
15B	Sergeant Missile Crewman
15D	Lance Missile Crewman
15E	Pershing Missile Crewman
15F	Honest John Rocket Crewman
15J	Lance/Honest John Operations/Fire Direction Assistant
**16B	Hercules Missile Crewman
**16C	Hercules Fire Control Crewman
**16D	Hawk Missile Crewman
**16E	Hawk Fire Control Crewman
16F	Light Air Defense Artillery Crewman
16P	Chaparral Crewman
16R	Vulcan Crewman
17K	Ground Surveillance Radar Crewman
54C	Smoke and Flame Specialist
82C	Artillery Surveyor

* Based on existing MOS as of Change 6, AR 611-201.

** Do not appear on current list of closed MOS in AR 611-201.

NON-COMBAT SKILLS WHICH PRECLUDE WOMEN FOR MANAGEMENT REASONS

Taken from Annex B of Chapter 4 of the Women in the Army Study, Headquarters, Department of the Army, December 1976.

Skills for Temporary Closing Based on Management Considerations*

MOS	TITLE	REASON
16J	Defense Acquisition Radar Crewman	Rotation Base
21G	Pershing Electronics Material Specialist	Rotation Base
24C	Improved Hawk Firing Section Mechanic	Rotation Base
24E	Improved Hawk Fire Control Mechanic	Rotation Base
24G	Improved Hawk Information Coordination Central Mechanic	Rotation Base
24H	Chaparral System Mechanic	No Entry Level Positions
24P	Defense Acquisition Radar Mechanic	Rotation Base
24U	Hercules Electronics Mechanic	Rotation Base
25J	Operations Central Repairman	Career Progression
31D	Pershing Communications Specialist	Career Progression
45P	Sheridan Turret Mechanic	Rotation Base
45R	Missile Tank Turret Mechanic	Rotation Base
62H	Concrete Paving Equipment Operator	No Entry Level Positions

*Based on existing MOS as of Change 6, AR 611-201.

DEPARTMENT OF THE NAVY

United States Atlantic Fleet
Headquarters of the Commander in Chief
NORFOLK, VIRGINIA 23511

THIRD ENDORSEMENT on CO, USS SANCTUARY (AH 17) ltr ser 351 of 19 Nov 1973
From: Commander in Chief U. S. Atlantic Fleet
To: Chief of Naval Personnel
Subj: Women Aboard USS SANCTUARY (AH 17); evaluation of

1. Forwarded.

2. Comments and recommendations:

a. It is clear from enclosure (1) that primary emphasis in continuing the program of assigning women to ships should be in developing a corps of senior female petty officers with seagoing experience. Assigning experienced females to supervisory positions would solve a large number of the problems encountered in SANCTUARY, including, specifically, good order in berthing compartments, handling of complaints of menstrual discomfort, and others.

b. Female enlisted personnel were and are being assigned to SANCTUARY on a voluntary basis. Neither females nor males are specifically screened for SANCTUARY, nor, under the "One Navy" concept, is such screending desirable. In general, if women are to be fully integrated into the Navy they should be assigned to ships with the same training and time in service as men. Special screening of females for assignment to forces afloat would be a discriminatory practice and is not recommended. Additionally, it should be noted that EPDOLANT does not have access to service records and thus does not have the capability to screen non-rated personnel; furthermore, there is generally little basis on which to screen first-termers.

c. In the future, women scheduled to report to ships should be better advised on clothing and personal belongings restrictions necessary to life afloat. It is questionable whether ". . .the average enlisted woman will require a small wardrobe."

d. While the legal status of women officers on board ship is at best unclear, there appears to be no law or regulation specifically prohibiting women standing watch as Officer of the Deck underway. Attention is invited to Article 1003 of U. S. Navy Regulations 1948 (continued in effect as CNO Regulations pursuant to NAVOP 56 of 1973). While Article 9002 of U. S. Navy Regulations 1973, in denying women eligibility for command at sea, does prohibit their becoming Command Duty Officers, this Article would not seem to be an impediment to women standing watch as Officer of the Deck underway. With respect to women officers, there is no apparent reason for the distinction made in SANCTUARY between Officer of the Deck underway and Officer of the Deck in port. Specific guidance on the legal status of women in ships should be issued, especially in light of the possible passage of the Equal Rights Amendment.

e. Particularly noteworthy in SANCTUARY's report is the statement that "women can perform every shipboard function with equal ease, expertise, and dedication as men do." Significant in this regard is the success of women on General Quarters repair parties and on General Emergency Teams, performance on which is a good guage of general naval ability.

f. In general, the statements in paragraph (3), page 13-1, enclosure (1), do not represent severe problems, considering the nature of seagoing life. Not all male enlistees find themselves completely happy at sea either. Solutions to female complaints should be sought where possible, of course, but the same standards of maturity should be set for females as males.

g. Commanding Officers have sufficient authority to deal with persons having difficulty adjusting to mixed crews. Special authority is not required any more than in

handling racial problems. Lieutenant Canfield's remarks in paragraph (3) of her memo, and CO, SANCTUARY's actions detailed in paragraph (8), page 13–2 of enclosure (1), are cogent here.

3. In Summary, given SANCTUARY's conclusion that "both men and women have merged into members of a common disciplined crew," the pilot program has clearly been a success. While numerous difficulties developed, all are capable of solution or tolerable, if women will accept the challenge of going to sea.

/s/ _____
R. W. HAWTS
Assistant Chief of Staff

Copy to:
COMSERVLANT
COMSERVRON 2
CO, USS SANCTUARY (AH 17)

UNCLASSIFIED C-13

PRIORITY	DRAFTER'S RELEASER TIME	PRECEDENCE	LMF	CLASS	CIC	FOR MESSAGE C	TELECOMMUNICATIONS CENTER ONLY
01	02 0000000	RR	RR	UUUU			221602Z NOV 76

MSGA MESSAGE HANDLING INSTRUCTIONS

FROM: CHNAVPERS WASHINGTON DC

TO: CINCLANTFLT NORFOLK VA

CINCUSNAVEUR LONDON UK

CINCPACFLT MAKALAPA HI

UNCLAS PERSONAL FOR ADM'S KIDD, BAGLEY, AND HAYWARD FROM WATKINS

//N00000//

MALE/FEMALE LOST TIME COMPARISON

1. PROVIDED HEREIN ARE THE STATISTICS I PRESENTED AT THE RECENT CINC'S CONFERENCE ON LOST TIME COMPARISONS. THESE ARE FORWARDED AS REFERENCE MATERIAL AND FOR PROMULGATION TO SUBORDINATE COMMANDS AS YOU DEEM APPROPRIATE. THEY ARE DERIVED FROM DATA AVAILABLE WITHIN BUPERS AND COVER SIGNIFICANT, BUT NOT ALL LOST TIME CATEGORIES (READ IN SEVEN COLUMNS TITLED AS FOLLOWS):

(1) LOST TIME CATEGORY

(2) NUMBER OF WOMEN

(3) WOMEN LOST DAYS

(4) WOMEN PERCENT OF LOST TIME TO DAYS AVAILABLE

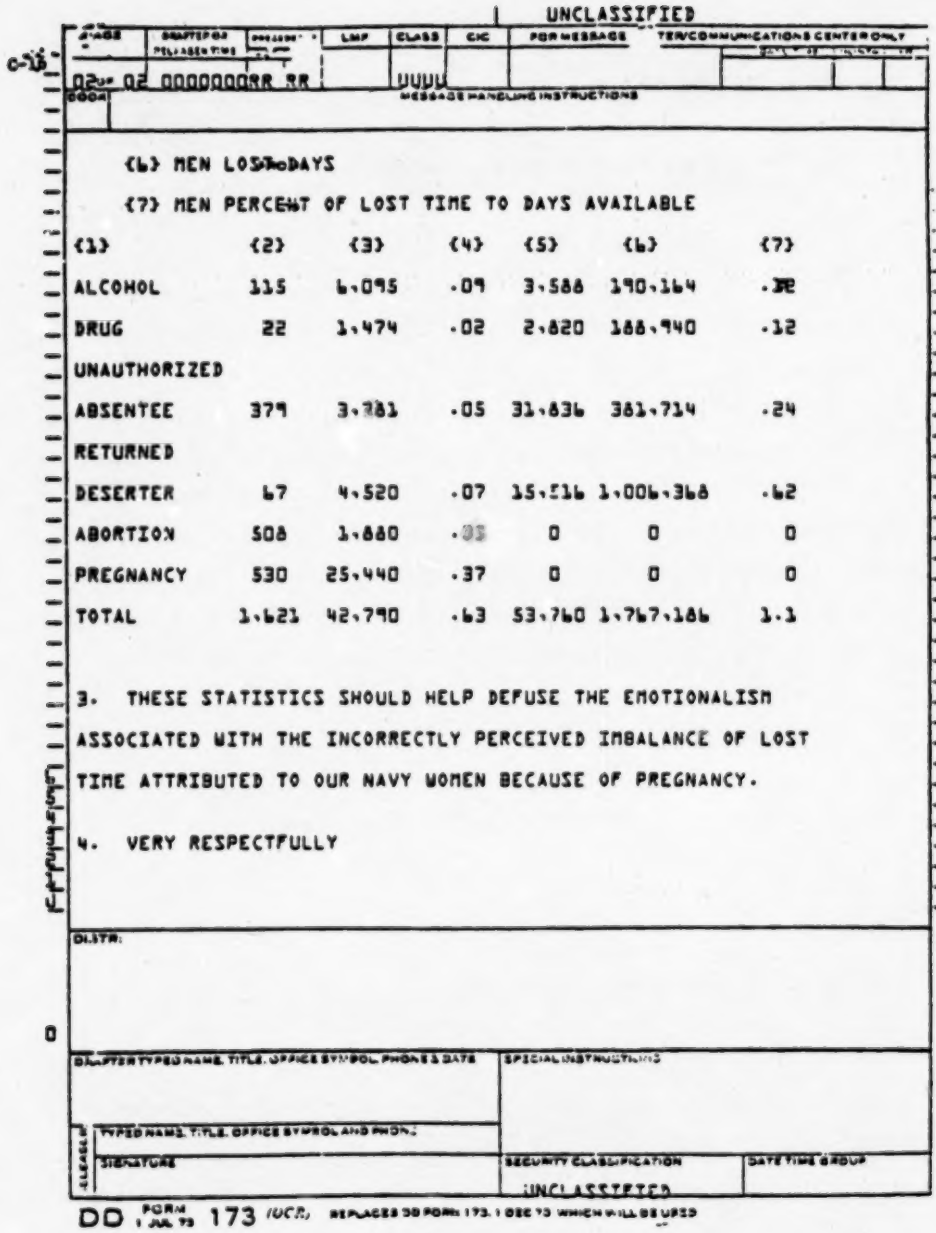
(5) NUMBER OF MEN

DISTR:

DRAFTER: BCNP/RELEASER: CNP

DRAFTER TYPED NAME, TITLE, OFFICE SYMBOL, PHONE & DATE	SPECIAL INSTRUCTIONS
RADM W.L.MCDONALD, BCNP, 41101	BCNP [signature] OA [signature]
JAMES D. WATKINS, VADM, CNP, OX41101	
SIGNATURE [signature]	SECURITY CLASSIFICATION: UNCLASSIFIED
	DATE TIME GROUP: 221600Z NOV 76

DD FORM 173 (OCR) REPLACES DD FORM 173, 1 DEC 70, WHICH WILL NOT BE USED



UNCLASSIFIED

PRECEDENCE | DTG OF RELEASE/TIME | LMF | CLASS | CIC | FOR MESSAGE | TEN/COMMUNICATIONS CENTER ONLY

02 02 000000ZAPR AR | UUUU

SUBJ: MESSAGE HANDLING INSTRUCTIONS

(6) MEN LOST TO DAYS

(7) MEN PERCENT OF LOST TIME TO DAYS AVAILABLE

(1)	(2)	(3)	(4)	(5)	(6)	(7)
ALCOHOL	115	6,095	.09	3,588	190,164	.32
DRUG	22	1,474	.02	2,820	188,940	.12
UNAUTHORIZED ABSENTEE	379	3,781	.05	31,836	381,714	.24
RETURNED DESERTER	67	4,520	.07	15,116	1,006,368	.62
ABORTION	508	1,880	.03	0	0	0
PREGNANCY	530	25,440	.37	0	0	0
TOTAL	1,621	42,790	.63	53,760	1,767,186	1.1

3. THESE STATISTICS SHOULD HELP DEFUSE THE EMOTIONALISM ASSOCIATED WITH THE INCORRECTLY PERCEIVED IMBALANCE OF LOST TIME ATTRIBUTED TO OUR NAVY WOMEN BECAUSE OF PREGNANCY.

4. VERY RESPECTFULLY

DISTR:

RELEASER: TYPED NAME, TITLE, OFFICE SYMBOL, PHONE & DATE | SPECIAL INSTRUCTIONS

TYPED NAME, TITLE, OFFICE SYMBOL AND PHONE

SIGNATURE | SECURITY CLASSIFICATION: UNCLASSIFIED | DATE TIME GROUP

DD FORM 1 JUL 73 173 (UCR) REPLACES DD FORM 173, 1 DEC 70 WHICH WILL BE USED

APPENDIX F

September 1978 Update

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R 082058Z SEP 77
FM HQDA DAPE-MPE-CS/WASH DC
TO AIG 7406

UNCLAS
SUBJECT: Employment of Women Soldiers

1. A recent DA study of women soldier employment indicated there are difficulties associated with their assignment to additional duties and perceptions exist that Army policy precludes their employment forward of the brigade rear boundary.

2. The purpose of this message is to clarify Army policy concerning the above areas:

A. Army women will not be assigned to category 1 units nor awarded combat or close combat support MOS (Chapter 4, AR 611-201 and Chapter 5, AR 570-4). The intention is to prohibit the use of women in combat forces as combatants (as defined in AR 310-25, dictionary of United States Army terms). They will be trained to defend themselves individually as well as participate in the

unit defense of combat support and combat service support units and should be employed by unit commanders in the same manner as male soldiers.

B. Unit commanders are authorized to employ women to accomplish unit missions throughout the battlefield so long as the combat exclusion policy (Para 24, above) is not violated. Women are not excluded from performance of mission duty forward of the brigade rear boundary.

C. Soldiers will not be excused from the performance of unit duties solely on the basis of gender.

3. Combat exclusion policy for women as well as other facets are currently under review. Upon completion of this effort, the above policies will be revised as appropriate and published in applicable regulations.

4. Request the above receive the widest dissemination.

R 032227Z MAR 78 ZOC ZEO T ALL US ARMY REPS AND ACTIVITIES
FM HQDA WASH DC//DAPE-MPE//
TO ALARACT

UNCLAS
Rogers Sends
Subject: Women in the Army

1. In the last five years the number of women in the active Army has more than tripled while an even greater increase has occurred in the reserve components. These increases and the entrance of women into many nontraditional skills present challenges. The purpose of this message is to emphasize the Army's commitment to the integration of women and to provide fundamental guidance to ensure this integration is completed smoothly and rapidly.

2. Today, women are successfully performing a wide variety of duties many of which were considered solely in the male domain just a few years ago. A recently approved combat exclusion policy opened more specialties to women than ever before. However, equal training for men and women was only recently implemented. Consequently,

many women in the Army have not received all the training in soldier skills needed to perform their duties. Unit commanders must provide for these women additional individual training as required and ensure their full participation in unit training, field exercises and unit duties such as perimeter guard.

3. Qualified women now have the opportunity to serve in all but a few specific combat units and combat specialites. In availing themselves of that opportunity women, like their male counterparts, must accept the responsibility for sharing all risks and enduring all hardships inherent in their specialty. Some people believe that women soldiers will not be deployed in the event of hostilities; that they are only to be part-time soliders—here in peace, gone in war. Some women are being used in skills other than those for which they were trained and some are being excused from performance of unit duties. The Army cannot operate effectively in this manner. Women are an essential part of the force. They will deploy with their units and they will serve in the skills in which they have been trained.

4. Those of us in authority must reaffirm our conviction that women are an integral part of the Army. With this in mind, we must ensure that women are provided an equitable opportunity for assignment in their specialty, are given adequate training and are held responsible for the full range of duties prescribed for their assigned positions.

5. The first considerations in the assignment of women in the Army have been, and will continue to be, the mission of the Army itself, and the uniquely demanding nature of Army service in wartime. Within that context, women can make many important contributions; indeed, they are doing so now. The burden which rests on leaders at every level is to provide knowledgeable, understanding, affirmative and evenhanded leadership to all our soldiers.

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This letter is provided by the Department of Defense in response to Section 303 of P.L. 95-79, which states:

> "For the purpose of promoting equality and expanding job opportunities for the female members of the Armed Forces, the Secretary of Defense shall within six months from the enactment of this section, submit to the Congress a definition of the term 'combat,' together with recommendations on expanding job classifications to which female members of the armed services may be assigned, and recommendations on any changes in law necessary to implement these recommendations."

Definition of Combat. The term "combat" refers to "engaging an enemy or being engaged by an enemy in armed conflict." Under current practices, a person is considered to be "in combat" when he or she is in a geographic area designated as a combat/hostile fire zone by the Secretary of Defense. Members of the armed forces, not in a designated combat/hostile fire zone, may be designated as being "in combat" by the Secretary of Defense based on specific circumstances and events. These definitions apply to men and women of all the services.

A servicemember in combat is authorized to receive combat/hostile fire pay and earn combat awards. Women have received hostile fire pay and combat awards in past conflicts. Women have served in combat in many skills during World War II, Korea, and Vietnam. Army nurses have served in combat for over a hundred years, although they and other medical personnel are considered noncombatants. Since the word "combat" has historically been used to include such a broad range of activities, the Department of Defense does not believe that the term provides a useful basis for expanding the opportunities for women in the service.

Expanding Opportunities for Female Members

Before 1970, less than 1% of the enlisted force was female. As shown on the attached table, this Administration is expanding the role of women. The Department of Defense plans to increase from 6% females in 1977 to 11% by 1983. Over 95% of military occupations are now open to women. The role of women probably has changed most in the Army, in part because there are no legal constraints. Almost 7% of Army enlisted personnel are women and that will increase to about 12% in 1983. Army unit commanders employ women to accomplish unit missions throughout the battlefield. The Army accepts the fact that women may be exposed to close combat as an inevitable consequence of their assignments, but does not now assign women to units where, as a part of their primary duties, they would regularly participate in close combat. Close combat involves engaging an enemy with individual or crew-served weapons while being exposed to direct enemy fire, a high probability of direct physical contact with the enemy's personnel, and a substantial risk of capture.

In the Army, women are now assigned to all units except infantry, armor, cannon field artillery, combat engineers, and low altitude air defense artillery units of battalion/squadron size or smaller and in all military occupational specialties except those concentrated in such units. For example, women are assigned to combat support and combat services support units in divisions, including maintenance battalions, communications battalions, brigade level headquarters, and certain artillery units.

Unlike the Army, the Navy and Air Force have legal constraints on assignment of women. The current law (10 U.S.C. 6015 and 8549) precludes women in the Navy and Air Force from being assigned duty in aircraft engaged in combat missions. In practical terms, 10 U.S.C. 6015 has the effect of excluding women from serving aboard Navy ships. A combat mission is a mission of a unit, ship, aircraft or task organization which has as one of its primary objectives to seek out, reconnoiter, or engage an enemy.

The Air Force has planned for continued expansion within the context of the current law. Women now comprise over 7% of the Air Force enlisted strength. The Air Force plans to increase that percentage to 15% by 1983, even under the current laws. Essentially, all military occupations in the Air Force are open to women except the aircrew positions restricted by the combat mission provisions of the law.

The Navy, however, is severely limited by current law. The Navy has increased assignments for women to the maximum extent practical within the constraints of current law. In the Navy, the restriction on shore positions associated with sea/shore rotation multiplies the impact of excluding women from service on ships. The Navy cannot increase female strength as projected in the attached table unless 10 U.S.C. 6015 is repealed or modified. At least some relief from 10 U.S.C. 6015 is needed this spring. Within Congressional relief, the Navy will provide female midshipmen summer training similar to the males, will begin to build a base of women in seagoing skills, and will further increase opportunities for women in occupations now open to women.

Legislation

Legislation is needed to modify the restrictions on assignment of women in the Navy and Air Force contained in 10 U.S.C. 6015 and 8549. The Department of Defense urges enactment of H.R. 7431, which would permit assignment of women in the Navy to hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions, and would permit women to be assigned to temporary duty on other vessels not engaged in combat missions. This legislation will provide for the immediate need of the Navy to accommodate the training requirements of women now attending the Naval Academy. The best long-term solution is to repeal both 10 U.S.C. 6015 and 8549. The Secretaries of the Military Departments should set policy for, monitor, and review the assignment of women within their respective departments.

The Secretary of Defense should review and approve the programs of the services and insure compatibility among the services. A legislative proposal to accomplish this long-term goal will be submitted by the Department to the Congress in the near future.

Sincerely,

GALLUP YOUTH SURVEY - June 21, 1978

By George Gallup, Copyright 1978, The Associated Press

American teen-agers of both sexes favor women serving with men in a variety of combat roles during wartime.

When the Gallup Youth Survey recently questioned a representative national cross-section of American teen-agers on their attitudes toward women in the military, it found that teens consider it appropriate for women in the Air Force to serve as combat pilots and for women in the Army or Marine Corps to fight as ground troops in combat units alongside men, in the case of war.

Nationally, fully two teen-agers out of every three (68 percent) express the view that women should be allowed to serve as combat pilots.

And while the margin of approval is smaller, a 53 percent majority of teens voice the opinion that women members of the ground forces should be permitted to serve in traditional foot-soldier's combat capacities.

What may surprise some adult observers is that on both issues involving female participation in presently all-male military functions, there is every bit as much support from teen-age girls as there is from boys.

As a case in point, the concept of women as combat pilots gets the nod from 70 percent of girls and 66 percent of boys. As for women soldiers fighting beside men in the front lines during war time, 51 percent of boys approve, while 56 percent of girls do so. (In each instance, the small differences between the two sets of figures are statistically insignificant).

On each of the two combat questions, there is also slightly more support for female participation in combat duties on the part of teen-agers from white-collar families and teens whose fathers had some college training.

Teen-agers living in the South are least receptive to combat functions for women—indeed, a 49 percent plurality in this region opposes women soldiers or marines serving in frontline units—the only group in which less than an outright majority supports this type of war-time service.

But while this finding might prompt some readers to conclude that chivalry is making a last ditch stand in the South, the differences in regional attitudes are not large enough to warrant such a conclusion.

In fact, when teen-agers are asked why women should not be permitted to serve in combat roles, the attitude that such activities are "unladylike" or not "genteel" is not mentioned at all, either in the South or anywhere else in the country.

Typical of the views of teen-agers who believe that a woman's place is not in the foxhole, even in time of war, are these comments of a 15-year-old boy:

> "Women generally do not have the strength and stamina of men and they would probably not be able to handle combat duties. In fact, they might even be more of a hindrance than an asset in some situations."

While there are quite a few different reasons underlying the majority opinion that women should be permitted to perform in combat positions, the most prevalent is illustrated by these remarks of a 15-year-old girl:

> "Women have the right and the responsibility to do what men do. In this country, there are plenty of strong, brave women who would be proud and happy to serve in the U.S.A."

The findings are based on telephone interviews with a representative national sample of 1,179 teen-agers, 13 to 18 years old, during the period February 24–March 6, 1978.

Following are the questions asked and the principal findings:

WOMEN AS COMBAT PILOTS

	Approve	Disapprove	No Opinion
NATIONWIDE	68%	28%	4%
Boys	66	30	4
Girls	70	26	4
Both Sexes			
13-15 years old	68	28	4
16-18 years old	68	28	4
White-collar family	71	25	4
Blue-collar family	67	28	5
Father's Education			
College or more	75	23	2
High school or less	66	29	5
East	70	27	3
Midwest	70	26	4
South	62	33	5
West	73	21	6

WOMEN IN COMBAT UNITS?

	Approve	Disapprove	No Opinion
NATIONWIDE	53%	43%	4%
Boys	51	45	4
Girls	56	40	4
Both Sexes			
13-15 years old	53	43	4
16-18 years old	54	42	4
White-collar family	57	39	4
Blue-collar family	50	46	4
Father's Education			
College or more	59	37	4
High school or less	51	45	4
East	56	41	3
Midwest	55	41	4
South	47	49	4
West	56	39	5

The potential use of women discussed on pages 15 through 22 and 31 through 46 has not been replicated. The basic data remains valid, with some possible exceptions. In the Navy and Marine Corps changes in the laws precluding the assignment of women to ships (10 USC 6015) would reduce positions closed to women for both combat

and rotation base reasons, and thus would increase the number of spaces in which women could serve. The change in Army policies admitting women to the battlefield area and opening additional skills to women would have similar impacts. The Air Force already had over three-quarters of their positions open to women, but policy changes opening missile sights and aircrew positions would increase those percentages even further.

In September 1978, the limit on the numbers of women in the military appears to be related to flow patterns and assimilation. Since there is very little lateral entry of either men or women in the military, balanced forces require that growth be spread over a span of years. The ultimate limit may become supply constrained. The Services are beginning to notice supply constraints in nontraditional skills. The Army recently reduced mental test scores from a 57 percentile to 50 percentile for women recruits in order to increase supply. A similar average score for men is 50 percentile and the minimum score for men is 11 percentile. These data indicate that total supply is not yet a serious constraint—but it soon may be in some of the skills that are unattractive to most women.

Comparative lost time for men and women is discussed on pages 27 and 28. The conclusion in the background paper was that lost time was about the same for men and women, although the reasons for the loss are very different. Pregnancy and female related medical care was by far the primary cause of lost time for women. Men showed no lost time in these categories, although there is time lost by men when their wives are pregnant, but it was not measurable. Lost time for disciplinary problems, unauthorized absence, desertion and alcohol and drug abuse all were dominated by men. The additional work on lost time since May 1977 is not very definitive, but does reenforce the conclusion of the background study that total lost time is not a factor of great distinction between men and women and should not be a deciding factor in the use of women in the military. The next paper in this appendix summarizes current lost time information.

The single military parent and both parents in the military are persisting and growing problems for both men and women in the military. The deployability problems discussed on page 28 of the background study remain unresolved. The number of single men with dependent children is much higher than the number of women, but the incidence rate is higher for women.

Comprehensive data on the problems are not readily available in DoD. The Services are grappling with the problems; but short of discharging all personnel in these catagories, there are no easy solutions. Some military leaders are strong proponents of the discharge solution, but many of the personnel in these categories are motivated and well trained personnel who could not be readily replaced. Also, the status of people tends to change with marriages, divorces, separations, illnesses, adoptions, children living with grandparents, spouses being discharged or enlisting, etc. Simplistic solutions are not appropriate, but solutions are necessary. Putting off the problems is not the answer. If not resolved beforehand, these problems could greatly complicate mobilization day actions. The problems will probably have to continue to be resolved by the on-scene commander in the field.

The background study to date indicates that our armed forces may be somewhat different with women, but no less effective.

Mr. TREEN: Thank you, Mr. Chairman. I have three questions.

First, to you, Mr. Secretary, regarding the draft, in the event that we have to return to involuntary conscription to meet our manpower needs, what are your views with regard to whether or not that would include women being drafted?

Secretary BROWN: My own view is that if conscription is restored, that it should include the registration of women, if it takes place. Whether or not women are to be conscripted, it seems to me, would have to await a further examination of what our assignment procedure would be. In other words, I am not prepared to express a view on

conscription of women because I think we first have to look at what the personnel needs will be under those circumstances. If there would be additional requirements for noncombat people, then I would have one answer. If the principal requirements in an emergency contingency would be for combat fillers, for example, then I would have a different kind of conclusion. So I don't want to express a flat conclusion either way.

I would say that if men are registered, women ought to be too.

Mr. TREEN: Thank you.

INFORMATION PAPER

DAPE-MPE-CS
26 Jul 77

SUBJECT: Brookings Institution Study: Women in the Military

Discussion:

1. Authors: Martin Binkin (senior fellow in Brookings Foreign Policy Studies program) and LTC Shirley Bach, USAF (was a Brookings Federal Executive Fellow in 1975–76).

2. Historical look reveals undefined women's role prior to World War II, creation of the women's branches of the armed services in 1942, accession of 350,000 women in four services, and a post war return to apathy and drastic decreases in numbers of female soldiers on active duty.

3. Expanding women's role in society in 1960s and 1970s, coupled with ending of draft, signaled possible increased utilization of women in the services.

4. Impact of Equal Rights Amendment, feminist litigation and ending of draft resulted in: substantial increase in number of women in the armed forces; changes in personnel policies regarding command, aviation training and military academies, pregnancy; entitlements and training opportunities; more job assignments; increased numbers in

nontraditional skills; and influence on the socioeconomic composition of enlisted ranks.

5. Army policy allows 676,000 total enlisted jobs (including pipeline), but only 55,000 are open to women due to combat exclusion, rotation base, and promotion and assignment equity. Army has not altered its goal of 50,400 enlisted and 9,000 officer females since 1972.

6. Military benefits (economic opportunities) are extremely attractive to females due to lower mean annual earnings expected in civilian market (compared to that for males). Consideration given to worth of military pay, job training and educational assistance, social opportunities and intangible military benefits.

7. Institutional attitudes (social, political, judicial, and military) which reflect a past pattern of male dominance, will determine women's role in armed forces. Public opinion, Congressional attitudes, judicial opinion and military attitudes indicate a general willingness to increase number of women in the military.

8. Cost analysis:

a. One-time adjustment costs hard to determine. Requires closer examination. (Examples of one-time adjustment costs are: constructing or modifying housing, redesigning clothing and equipment, and redesigning protective gear.)

b. Average annual per capita cost associated with housing, medical care and transportation is estimated to be $982 less for women than men.

c. Attrition rates are higher for women than men (depending on occupation) and could be more costly. Higher attrition rates resulted primarily from policies.

d. Absenteeism is higher for men due to alcohol abuse, drug use, AWOL, and desertion. When abortion and pregnancy are considered for women, men still have higher absenteeism rate (1.10 for males to 0.63 days lost as a % of total days available).

e. Cost summary: may be less expensive, on average, to sustain women in the military.

9. Military effectiveness is examined through individual performance (education, job aptitude, physical condition, experience, motivation, adaptability to change, and ability to get along), group performance, and image abroad. "A healthy measure of uncertainty remains about how greater female participation would affect all three." Ergo: impact on military effectiveness is unquantifiable, but needs to be tested.

10. Army could provide 175,000 female positions by opening noncombat jobs in units expected to operate outside the brigade area and reducing reserved billets for men; 285,000 female positions would exist if women were only restricted from combat specialties and assigned to noncombat specialties in all units.

11. Apparent central issue of study: Army is not integrating women at a fast enough pace.

12. Army position is that before any valid decisions can be made on female strength levels, the impact of increases above the 59,400 (50,400 enlisted and 9,000 officer) level on the ground combat mission and readiness must be known. A massive effort is underway to collect and analyze data upon which the appropriate female strength can be determined while maintaining force readiness and cost effectiveness for the Army. Specifically, data concerning strength and physical standards by MOS, combat exclusion, performance of women in MOS, deployability and comparative performance (to be addressed by REFWAC 77 scheduled for Aug-Oct 77 with final results due to DA on 1 Mar 78), attrition, maximum female content, model modifications, and cost of increased female strength levels will be available in Mar 78 for Army FY 80-84 POM decisions.

13. Coordinated with ASA (M&RA).

DEPARTMENT OF THE ARMY
Office of the Deputy Chief of Staff for Personnel
WASHINGTON, D.C. 20301

30 SEP 19

DAPE-MPE-CS

MEMORANDUM THRU CHIEF OF STAFF, US ARMY
ASSISTANT SECRETARYOF THE ARMY (M&RA)

FOR SECRETARY OF THE ARMY

SUBJECT: Combat Exclusion Definition for Women—DECISION MEMORANDUM

Purpose: To obtain the Secretary of the Army's approval of the combat exclusion definition for women.

Discussion:

1. The DCSPER was directed by the DAS to develop a new, clear, simple definition of the combat role from which women will be excluded. The definition is to clearly reflect the level to which the exclusion applies and to avoid limitations due to geography or strength requirements.

2. As a point of departure, MACOMs and the staff were requested to propose a definition using the one in the message at TAB A as a starter, to indicate the level to which the exclusion applied. Essentially, there was no major departure from the one proposed by ODCSPER, except for INSCOM (Intelligence and Security Command) which recommends exclusion based on MOS. The level to which the exclusion is to apply was not specifically addressed by some MACOMs, others relied on the definition for this purpose, with the remainder generally indicating a preference for exclusion as brigade, battalion, and lower levels. The definition has been modified from that in the message to further clarify its meaning and eliminate the need to specifically name each type unit in the force structure.

3. The following definition is proposed:

Women are authorized to serve in specialties/MCS open to them at all organizational levels and within all units of the Army except:

—battalion and lower level combat maneuver units whose mission is to close with and destroy the enemy.

4. In arriving at the proposed definition, consideration was given to developing the exclusion in terms of combat related functions (e.g., crewing and operating weapon systems); or combat units with their stated or implied tasks (e.g., closing with, engaging, destroying, neutralizing and/or capturing an enemy by fire or fire and maneuver); or a combination of the two. It is believed the clearest approach is to use the combat maneuver units and the others indicated for communicating intent and as a basis for the exclusion. The definition reflects this, and also relies on the present interpretive system that identifies specialties and MOS open and closed to women in applicable Army regulations.

a. Field artillery cannon (105mm; 155mm; 175mm and 8-inch) and low to medium altitude air defense artillery battalions (CHAPARRAL/VULCAN and HAWK) are included in the definition because of the close combat support provided to the maneuver units or the potential need to meet this requirement.

b. That part of the definition concerning "units not specified . . ." would apply to units such airborne and airmobile forces, the combat engineers, special forces, and selected aviation organizations such as attack helicopter companies.

5. Examples of units or headquarters that would be newly opened to women are field artillery missile battalions (LANCE and PERSHING), target acquisition batteries, high altitude air defense artillery battalions (NIKE HERCULES) and field artillery group and division artillery headquarters.

6. To support the broader definition it is envisioned that the present system of identifying units by category would be expanded by dividing Category 1 units into Category 1A (Male only) and Category 1B (Interchangeable). Approval authority for the designation would remain at DA.

7. The DOD Appropriations Authorizations Act, 1978 (approved on 30 July 1977) allows the DOD six months to

define the term "combat" for the purpose of assigning women to military positions. Upon your approval, the definition in paragraph 3 will be the basis for the Army's input to OSD.

8. This paper has been coordinated with DASA (M&RA), who desires to add the following: "battalion and lower level field artillery cannon and low to medium altitude air defense artillery units, *except for headquarters and service batteries*." The added phrase should be examined in the ADMINCEN evaluation now underway, but is considered premature and preemptive at this time. Accordingly, it is not included in this recommended definition.

Recommendation: The Secretary of the Army approve the proposed combat exclusion definition for women.

/s/ _____
JOSEPH P. KINGSTON
Major General,
Assistant Deputy Chief
of Staff for Personnel

1 Incl
as

SPECIAL REPORT S-7

WOMEN CONTENT IN THE ARMY—REFORGER 77 (REF-WAC 77)

Cecil D. Johnson, Bertha H. Cory, Roberta W. Day, Laurel W. Oliver, et al.

CAREER DEVELOPMENT SOLDIER PRODUCTIVITY TECHNICAL AREA

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Office, Deputy Chief of Staff for Personnel
Department of the Army

30 May 1978

PREFACE

The behavioral science research effort reported here was undertaken to contribute information for use along with that from several research investigations and other sources in determining Army long-range policy bearing on the number and utilization of women in the Army. This research is in consonance with the Army five-year research plan for exploring the role of women in the Army.

The MAX WAC research showed that the number of women (up to 35%) had no significant effect on the operational capability of specific Category II and III company-size units as measured by 72-hour Army Training and Evaluation Programs (ARTEP). Extrapolation of results (assuming no impairment for an enlisted woman content of 35%) to units of the type included in MAX WAC showed that the Army could accept up to 6,000 more enlisted women than in the then-current assignment planning. The REF WAC results indicate no impairment of performance in Category II and III units having women in an extended field exercise. These results thus enhance the credibility of the no-impairment finding of MAX WAC.

Neither the MAX WAC nor REF WAC research efforts was intended to provide an empirical basis for objectively establishing an upper bound on the potential number of women in support units. Both efforts have had their primary focus on the validation of TRADOC unit limits for women.

Both the MAX WAC and REF WAC investigations have provided the Army with additional data (observations, questionnaire responses, and, for REF WAC, supervisory ratings) for insights into the evaluation of the role of women. Two major conclusions must be considered by policymakers:

a. Contrary to opinions of many who extrapolated from their experience in combat and extended field exercises (that did not include observations of women), women did sustain themselves in the field and accomplish MOS-related duties at an acceptable level. The command channel, from NCO's through unit commanders, showed a high degree of creativity and flexibility in utilizing women in the field. Additional training and indoctrination are still needed for enlisted women, their male peers, and their supervisors.

b. A consensus exists among unit supervisors that several factors should be considered in assigning women to teams: the proportion of women in the MOS and teams, the strength requirements of tasks, and the need to function in the midst of combat brigades as members of special teams. Such considerations could place further constraints on the numbers of women assignable to units, over and above those limitations that are imposed by closing some MOS to women.

(4) In the limited sample base of 229 women in the four CONUS and three USAREUR battalions selected for observation in the exercise area, 38 percent of these women were employed in such traditional roles as clerks and cooks.

3. FINDINGS AND CONCLUSIONS

Despite the limiting factors described above, the REF WAC Test Directorate staff recorded over 1800 observations of female performance as individuals and members of teams or sections before and during REFORGER 77 and Exercise CARBON EDGE. After-action reports, post-exercise questionnaires, and final critiques indicated that REFORGER 77 did in fact provide a viable means of assessing the impact of women on units operating in a protracted field environment. The significant findings and conclusions deal with:

a. *Impact on Unit Effectiveness.*

(1) Findings.

Women were observed performing in a wide cross section of Army combat support and combat service support units at the division and corps level. The branches and/or specialty areas covered were maintenance, medical, military police, signal, and supply and transportation. It was determined that the women had little or no adverse impact on the performance of their units. In a general sense, the women observed were contributors having a favorable impact on unit performance.

The following incidents, which far outnumbered derogatory ones, clearly demonstrate the contribution to unit effectiveness made by the conscientious, hard-working, and well-motivated female soldier:

(a) An enlisted woman was released from convalescent leave following major surgery. She was going to be left behind at Fort Riley but insisted on participating in REFORGER. Her performance was outstanding during the exercise.

(b) Two somewhat irresponsible male MP partners were split up by the supervisor. The supervisor paired one enlisted male with an enlisted woman, observing that the woman would "straighten him out."

(c) Two enlisted men told a REF WAC 77 observer that if they had to choose a partner, they would just as

soon pick the new enlisted woman, who had a reputation as a good worker.

(d) A female MP on the third day of the exercise required minor surgery for an infected finger. She expressed the desire to remain in the field, and was able to return to duty and continue her good performance.

(e) A female MP was performing duty at a traffic control point when she experienced a severe toothache. She was given emergency dental treatment and chose to return to duty rather than stay quartered in her billet.

(f) On the eighth day of the exercise, an enlisted woman went on sick call with the diagnosis of pneumonia. She had been working long and irregular hours with less than adequate sleep.

Some unit policies, which were preferential in nature and on the surface appeared to be helpful to women, did not promote participation of women in unit activities. These policies tended to alienate men who perceived assignment based on sex as favoritism toward women. The following critical example clearly identifies this mismanagement of resources: A REF WAC 77 observer noted that women in the ambulance platoon of a medical company were unemployed or assigned trivial tasks. When queried, the company commander stated that women were not being employed in the MTOE positions because the units being supported refused to have women in the forward area. The male members of the platoon had to "take up the slack" for these nonparticipants. Nonemployment of women in forward areas was a common but erroneously based policy. Commanders widely believed that Department of the Army policy prohibits the use of women forward of brigade rear boundaries. A policy that precludes women from performing their assigned duties adversely impacts on mission accomplishment.

A major deterrent to determining female impact on unit effectiveness was that frequently there were only a few women to observe; the number of women in units ranged from one or two individuals to, at most, 10 percent of a unit's strength. Despite this small sample, observers were

in agreement that the units observed could absorb women as 15 to 25 percent of their strength with no detraction from mission accomplishment. In establishing the level of male/female mix in a given unit type, the primary criterion was analysis of the unit's missions to determine the quantity and extent of tasks the unit must perform that required physical strength. Women's general lack of upper torso physical strength is the principal limiting factor in their performance of duty in the field and has a direct relation to female numbers and duties assigned to any given unit.

(2) Conclusions.

The assignment of women to a unit had no effect on the capability of the unit to fulfill its mission except in those instances where physical strength was a factor. Unit missions must be analyzed to determine the extent of physical strength required to fulfill those jobs and the male/female mix in the unit established accordingly.

b. *Training for Tactical and Sustainment Tasks in the Field.*

(1) Findings.

Women demonstrated a general lack of training for and knowledge of life in the field and of tactical operations. This lack of training and knowledge is detrimental to unit suvivability in a combat environment. Further, it places an added burden on and causes morale problems among male members of the unit who must take up the slack in any situation where females do not carry their fair share of the load. Under current methods of warfare, no unit is completely safe from ground attack no matter how far removed from the main battle area. Enemy guerilla bands operate in the rear areas seeking opportunities to disrupt the logistics chain. As a result, every unit, combat or combat support/combat service support, must be capable of establishing a strong perimeter defense and be prepared to withstand a full-scale attack, particularly during hours of darkness. Women must be prepared to fight in these situa-

tions, operate individual and crew-served weapons effectively, as well as being able to pitch tents, dig latrines, and stand guard duty if they are to carry their fair share of the load. Failure to perform these tasks during REF WAC 77 was not always due to lack of ability. Many women made an effort to acquire the knowledge they needed. However, either the common tendency of men to be protective or male nonacceptance of females often thwarted their efforts to learn. In units where commanders insisted that each individual, man and woman, carry a full share of the load in common tasks, the quality of unit performance was much higher than in units where women were protected or ignored.

The following incidents clearly identify the need for more intensive training for women in basic field duties and tactical skills.

(a) One commander expressed surprise to a REF WAC 77 observer that his supervisors had to spend so much time assisting women in field sustainment tasks. Prior to REFORGER, this commander was positive that women were a total asset to the Army. Viewing their performance, he felt that they were satisfactory in MOS-related areas in the field, but they were little help in setting up tents, camouflage, stoves, performing guard duty at night, staying warm, and keeping their living areas clean.

(b) While in the unit assembly area prior to the start of the tactical exercise, a REF WAC 77 observer asked 14 women if they would fight in combat. This informal survey resulted in 4 positive responses and 10 negative replies. The women appeared mentally to separate their performance in technical specialties from any notion of combat. They viewed their work as specialists in the Army as having no connection with combat.

(c) On the eighth day of the exercise at 0330 hours a communications center vehicle ran out of fuel during an alert. An enlisted woman stated she was afraid to go out and get fuel because of aggressor action. As a result, no communications existed for one hour.

(d) Four women made up a tent-pitching detail. Two of them got into a heated argument on how to pitch the tent. The argument lasted for some time prior to proceeding with the mission, indicating these women had not been trained properly in tent-pitching techniques.

(2) Conclusions.

Women need more instruction in coping with and participating in life in the field, to include tactical operations. Women's basic, advanced, and unit training must include the same preparatory training for life in the field that men receive. Additionally, both men and women, officer and enlisted, must be thoroughly indoctrinated from the start that all unit personnel, male and female, will share the load in the fulfillment of the common unit tasks.

c. *MOS Proficiency.*

(1) Findings.

Women were found highly proficient in the accomplishment of MOS tasks in both traditional and nontraditional roles. Women were highly motivated and their skills were as good or better than the males'. The one shortcoming that existed for women in MOS performance occurred in those tasks that required considerable physical strength. Even with this special selection criterion in mind, NCO data collectors identified only eight MOS's that were not recommended for women. One MOS, infantryman, is not authorized for women. Another MOS, military policeman, was not recommended for the reason that women do not possess the knowledge, experience, and training to perform tactical missions—a deficiency that can be overcome through proper training. Other MOS and tasks that the NCO data collectors on the evaluation teams believed could not be performed fully by women are as follows: 63H (tank automotive repairman); 64C (driver); 76W (petroleum supply specialist), 76X (subsistence supply specialist), 91B (medical specialist); and 94B (cook). For all of these MOS, the same basic reason was cited—women do not possess the physical strength/stamina to meet all of the physical requirements of the duties inherent in the

MOS. Test Directorate assessments of female capability in all MOS found in the units observed in REF WAC 77 are found in Table B-18 Appendix B. These assessments are based on all data available to the Test Directorate as of November, 1977.

(2) Conclusions.

Women are capable of rendering a proficient performance in any combat support/combat service support unit MOS not requiring a large measure of physical strength. An evaluation of each MOS from this standpoint is in order, to establish the minimal physical requirements necessary and preclude assignment of such an MOS to women (and men) who do not meet these minimum standards.

d. *Stamina and Endurance.*

(1) Findings.

Analysis of performance data indicated there was little difference in the level of performance of women versus men when measured over a period of some duration. An analysis of male and female individual performance was made in terms of improving and declining trends. Female levels compared very favorably with male levels in all cases. It appeared that women could match the stamina and endurance and maintain performance standards equal to those of men in the field. Furthermore, although given poor preparation for field duty, women did learn to adapt to their new environment. The only area in which they faltered was in performing tasks that demanded upper torso physical strength that they did not possess.

(2) Conclusion.

Women possess the required levels of stamina and endurance to sustain them through an extended field operation.

e. *Leadership and Management.*

(1) Findings.

Leadership and management problems were widespread among the units observed and appear to be the underlying

cause of most problems involving women in the Army. Many units either had policies that were protective of women or ignored women; either case was often passively accepted by the women. One REF WAC 77 team chief made the following statement that illustrates the magnitude of the leadership problem: "It was evident during the evaluation period that there is a lack of ability in the company grade officer and NCO ranks to lead effectively or motivate females operating in a sustained field environment. This stems from two factors, first, a lack of clearly defined instructions on their employment and, second, a lack of training in techniques and methods of motivating the female soldier." This mismanagement resulted in low morale in the units in which it occurred, and thus in a mediocre unit performance. Also, it created unrest among the male members of the unit who were required to perform extended periods of duty to fill in where the women were either excused or not employed. The practice of either ignoring women or protecting them, demonstrated frequently by first-line supervisors during REF WAC 77, is indicated by the following incidents.

(a) While a mess vehicle was being loaded, two female cooks sat idly in a tent because they were not assigned any duties.

(b) One women was released from hospitalization on 3 September and was not picked up by her unit until 7 September.

(c) During a unit alert, off-duty women sleeping in a separate tent were not called to defend the perimeter.

(d) A woman stated that women often sleep through guard duty tours with no repercussions and often they were not informed of the duty.

(e) A woman requested assistance from her supervisor in setting up a shelter half. The supervisor did not respond in any manner, but merely walked away.

(f) Four women sat in a tent upon arrival in a new area, not assisting anywhere because they were told they were in the way.

(g) One supervisor stated that the women on his team and other teams refused to change or service generators at night because they were afraid of the dark. As a result, the men on the various teams had to do the work that the women refused to perform, thus creating low morale among the men. The supervisor overcame the obstacle by accommodation, rather than by analyzing the problem, demonstrating his need for training in the management of women. The units in which all personnel, male and female, were required to carry the same load demonstrated much higher levels of unit performance, morale, and esprit.

(2) Conclusions.

Army leadership training must be expanded to include the methods and techniques for motivating the female soldier. Leaders at all levels in the chain of command must be taught that women in the Army are an integral part of the team and they are expected to carry out all duties commensurate with their rank and job assignment. Instruction in this important facet of leadership is appropriate for service schools, training centers, and unit officer and NCO classes.

f. *Bias Against Women.*

(1) Findings.

Descending the chain of command from battalion level to that of immediate supervisor, opposition to women in the unit increased. Generally speaking, senior officers, who were farthest removed from the problem, fully accepted women, junior officers appeared indifferent to the problem, and "old soldier" NCO's were openly opposed in word and action. Although NCO's generally admitted that women can perform well in their tasks, most NCO's just do not want them around. This NCO attitude is clearly evidenced in these incidents that occurred during REF WAC 77.

(a) During the course of the field exercise, a female soldier's ability to read a map was challenged by an equal-ranking male. The female had demonstrated satisfactory ability to read a map on two previous occasions as the senior individual in a vehicle. In both instances, she

reached her destination in an acceptable manner. On this mission, the male insisted she was in error. As a result the mission failed due to excessive time as the male repeatedly read the map incorrectly. This man was convinced in his bias against females in nontraditional roles that a woman could not possibly read a map.

(b) A platoon sergeant instructed a male sergeant to assist some women in taking down their tent. The sergeant responded by pulling up tent pegs while the women were still in the tent, until he was told to stop and let the women do the work themselves. The sergeant saw this as an ideal opportunity to harass an "undesirable" element (women) in the unit. This one incident probably best documents the real crux of resistance to female integration in the Army. The sergeant was following an order, and he simply did not want women in "his" Army. Female competence was not at issue.

(c) During the course of the exercise, a supervisor related to a REF WAC 77 observer an incident that occurred the previous day. A female enlisted member dropped an engine, pinning her leg, and the supervisor with some disgust had to run to her aid. He felt he was a babysitter and was convinced that women cannot perform adequately with heavy equipment. He also expressed the opinion that this woman would be no better working in an office. His mind had been made up that women are a bother in "his" Army.

(2) Conclusions.

Strong opposition exists at company level and below to the assignment of women to combat support/combat service support units. An Army-wide education program is required that stresses management and employment of women in a positive theme, which underscores the value and importance of women in the Army.

g. *Field Clothing for Women.*

(1) Findings.

Over 100 female service members were interviewed during REFORGER and questioned on the suitability of

female clothing and equipment. None of the women interviewed felt the clothing and organizational field equipment issued to women were adequate for field duty. The chief complaints were that fatigues were not wash-and-wear, were too lightweight to provide adequate warmth, and were ill-fitting. Women's field jackets provided little warmth in 30° temperatures and were discarded in favor of men's field jackets. The women also used male overshoes since there was an inadequate supply of female overshoes. The structure of women's combat boots was not sturdy enough to withstand the rigors of an extended period in the field. The web gear and load-bearing equipment were not designed for the weight-bearing capabilities of women. The suspenders of the load-bearing equipment placed pressure directly on the breast and exerted an abnormal amount of pull across the shoulders and neck. The equipment was very uncomfortable to women especially when used over an extended period of time in the field. Also, gloves and field jacket liners were not made in sizes small enough for women. A shortage of these items had an adverse impact on the comfort, appearance, and morale of female service members.

(2) Conclusion.

A requirement exists for the development of field clothing and equipment for women that can provide them the needed protection and comfort for an extended period of field duty.

h. *Female Field Health and Sanitation.*

(1) Findings.

Health and sanitation provided for women during REF WAC 77 proved inadequate. The great distance and infrequency of visits to shower points were a source of major complaint among the women. They found helmet baths unsatisfactory and voiced a desire for more frequent trips to the shower point. This requirement for frequent showering received support from the medical observers who verified that, gynecologically speaking, a woman has a greater need for more frequent attention to body cleanli-

ness than a man. For similar reasons, pit type latrines were not satisfactory for women, who sought other sources for relief. They expressed the added concern of possible assault while visiting a darkened latrine site some distance from their billet, although no such attack was ever reported. It was also noted during REF WAC 77 that field medical facilities were not equipped to attend to female-related disorders as evidenced by the following medical shortfalls:

(a) No obstetrician-gynecologist was available within the 1st Infantry Division, nor was one authorized.

(b) Initial planning failed to include particular female medications in the basic drug list.

(c) No vaginal speculums were available within the Division medical elements.

(d) No examination tables with stirrups were available for examining women, nor did the combat support hospital have examining tables equipped with stirrups.

The above list does not identify the full extent of the problems associated with the health care requirements of a large number of women on extended field duty. It does, however, indicate a problem exists that requires special consideration. Since this medical capability was lacking, female-oriented medical problems were necessarily referred to a base hospital some distance from the maneuver site.

(2) Conclusions.

Requirements exist for the development of field health and sanitation policies and procedures and for the provision of field medical facilities, drugs, instruments, and personnel that more adequately respond to the special health care requirements of women.

i. *Female Leadership.*

(1) Findings.

The number of female leaders, officer and NCO, participating in REF WAC 77, was so small that fully supportive findings could not be made. Observers did note

isolated incidents in which female leaders either had no concept of how to exercise their authority, or abused that authority. Female leaders were also noted to be lacking in tactical training. Additionally, there were occasions when women experienced difficulty in gaining acceptance as leaders. Their authority was ignored by men who would not accept women regardless of their demonstrated competence. The following incidents exemplify the above:

(a) A female platoon leader constantly exhibited poor leadership and contributed to or was the cause of low morale in her platoon. She could not or would not control her attitude toward the Army or her people in their presence. She demonstrated little respect for her enlisted personnel and gave little guidance to her NCO's. As a result, missions were performed without enthusiasm and morale was low.

(b) A male automotive warrant officer indicated to a REF WAC 77 observer that female NCO's "may not be able to handle the troops." This warrant officer's comment was purely speculative for there were no female NCO's in his technical field at the time, and he had no previous experience with female leaders. This lack of confidence in women expressed by this individual is indicative of male bias against female leadership in a nontraditional area.

(2) Conclusion.

The above observations provide further support for the requirement for improved tactical and leadership training for women as well as an Army-wide education program in support of women in the Army.

j. *Female Migrations from Nontraditional Specialties.*

(1) Findings.

Of the 229 women participating in REFORGER, 49 were working in an MOS other than their own. Of these, 17 had migrated from a nontraditional MOS to traditional specialities, while three had shifted from traditional to nontraditional specialities. Two women with nontraditional MOS were serving in other nontraditional MOS. The re-

maining 27, trained in traditional MOS, had migrated to other traditional MOS.

(2) Conclusions.

Slightly over seven percent (7.4%) of the females participating in REFORGER had migrated from nontraditional to traditional assignments.

k. *Female Content in Units.*

(1) Findings.

(a) Information was obtained from 108 first-line supervisors, 60 unit leaders, 25 observer team members, and 19 NCO data collectors. Their recommendations were taken on proportions of women to be utilized in the combat support/combat service support units under observation. This information concerned male-female ratios by MOS, team, section, platoon, and company. The information reflected both command policies and individual biases in real units in the REFORGER situation, leading to wide variations among the separate units. Illustrations of these variations are found in the reports of the chiefs of the signal and transportation teams. The signal team chief recommended, based on female strength limitation and current tactical proficiency, that no women be assigned to signal letter companies. The transportation team chief recommended, at the other end of the spectrum, the assignment of women in percentages up to 50 percent.

(b) The REF WAC Test Directorate subjectively analyzed this information in the context of observations on REFORGER, taking into consideration tactical and sustainment requirements, to develop recommended upper limits for female content in the observed units. Observations and considerations in deriving these upper limits include:

(*1*) The current level of tactical training among women observed on REFORGER was well below that of men.

(*2*) Companies with a high female density would encounter difficulties in operations such as perimeter de-

fense, reaction force, local patrolling, rear area protection (MP units) and interior guard.

(*3*) The primary rationale used in arriving at recommendations on female content in units is unit proximity to probable combat areas. Units operating in the division rear area could, under this concept, accept a higher female density than a unit operating habitually forward of the brigade rear boundary. An additional consideration was given to the factor of sustainment.

(*4*) Unit sustainment tasks requiring team efforts in heavy lifting, digging, or hauling over an extended period of time could have an adverse effect on a company with a high female density.

(2) Conclusions.

The REF WAC 77 Test Directorate recommends that the upper limit of female content in the subject combat support/combat service support units be as follows:

UNIT	AUTHORIZED STRENGTH	MAXIMUM FEMALE CONTENT	PERCENT
Maintenance Battalion (MTOE 29-26)			
Headquarters and Light Company	113	29	25
B Company	211	53	25
C Company	173	26	15
Medical Battalion (MTOE 8-37)			
Headquarters and A Company	138	35	25
C Company	76	19	25
Military Police Company (MTOE 19-37H)			
MP Company	166	26	15

UNIT	AUTHORIZED STRENGTH	MAXIMUM FEMALE CONTENT	PERCENT
Signal Battalion (MTOE 11-37)			
HHC	96	24	25
A Company	204	51	25
B Company	123	18	15
C Company	153	38	25
Transportation Battalion (MTOE 29-65H)			
HHC	49	12	25
A Company	140	35	15
B Company	183	46	15

4. FUTURE REQUIREMENTS.

a. *REFORGER 1978.*

(1) The military observers for REF WAC 77 do not recommend a repeat of the experiment for REFORGER 78. It is their belief that sufficient data were obtained during REFORGER 77 to offset the requirement for similar testing in 1978. There would be justification for repeating the experiment in 1978 if positive corrective action were taken on all the REF WAC 77 findings, e.g., female clothing, sanitation, health care, improved training of EW before the scheduled date of REFORGER 78, permitting the testing of innovations effected by this corrective action. If the corrective action is not accomplished by the date for REFORGER 78, then further tests certainly should be conducted at some future date to determine the effects, good or bad, of the corrective action taken based on the results of REF WAC 77.

(2) If the experiment is repeated in 1978, and maximum benefit is to be gained, it is imperative that the test sample of women be greatly increased in number. Also observers must have detailed advance knowledge of the scenario for the organization under study so they can plan for optimum coverage of the female participation.

(3) Recommended changes include:

(a) Predetermined AIT graduate fills of both male and female soldiers in exercise units.

(b) Organization, stabilization and pre-exercise training.

(c) Controlled deployment.

(d) Insertion of exercise-compatible scoring events on a limited basis.

STATEMENT OF
HARRISON WELLFORD
EXECUTIVE ASSOCIATE DIRECTOR,
OFFICE OF MANAGEMENT AND BUDGET
AND
DR. BERNARD D. ROSTKER
DIRECTOR, SELECTIVE SERVICE SYSTEM
AND
MR. RICHARD DANZIG
PRINCIPAL DEPUTY ASSISTANT SECRETARY
OF DEFENSE
(MANPOWER, RESERVE AFFAIRS
AND LOGISTICS)
BEFORE
SENATE ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON MANPOWER
AND PERSONNEL
FOR RELEASE AT 2:00 p.m.
WEDNESDAY, MARCH 19, 1980

The President's request for authority to register young women recognizes the reality that women are already providing all types of skills in every profession, including the military. The President's position is clear. It is consistent with the Administration's positions on equal rights for women and with the principle of fairness in imposing obligations on our citizens. However, we recognize that the registration of women is a controversial issue for many of our citizens. But sooner or later, this issue must be addressed. Just as with the overall issue of premobilization registration, we feel that it is more prudent and less disruptive to ask Congress to deal with it now—in a period of normalcy—than in the confusing time of mobilization in a national emergency.

The fact that women can perform effective service in the military is strongly supported by their record in past wars and in the peacetime armed forces. While often unrecog-

nized, women have played an important role in the defense of the Nation in previous wars. For example:

- In World War I, they served as Army nurses and telephone operators.
- In World War II, Navy and Coast Guard women served as nurses, mechanics, truck drivers, parachute riggers, air traffic controllers and typists. Women landed on the beaches of Normandy and served in the South Pacific, North Africa and during the invasion of Italy.
- In Vietnam, more than 7,000 women served in support roles which qualified for combat pay.

There are now 150,000 women serving successfully in the active Armed Services today and by 1985, it is estimated that there will be approximately 250,000 women in the Armed Forces. The Reserve Forces now have about 60,000 women serving with about 100,000 projected by 1985. Women in the military today participate in a vast array of occupations. Large numbers of military women work in occupations such as electronics, communications, navigation, radar repair, jet engine maintenance, drafting, surveying, ordnance, transportation and weather analysis. The work women in the Armed Forces do today is essential to the readiness and capability of the forces.

In the last few years, women have moved successfully into new fields in all branches of the services. In the Armed Forces today, 46% of all enlisted women are in non-traditional jobs. In the Air Force for example, there are 4 women generals, 31 pilots, 12 navigators, and 29 women in missile sites. They are serving virtually worldwide—including remote sites in Alaska and troubled areas such as Korea. Some 20,000 or 35% of Air Force women serve in non-traditional jobs, many of these directly related to the care and maintenance of the fighter aircraft and missile operations. They are vital to the readiness of the Air Force. The experience with the All-Volunteer Force shows women performing well in a wide variety of jobs; being promoted as soon as men on the average; hav-

ing higher test score averages and rates of high school completion.

Finally, we would emphasize that although the equity argument is important, it does not lead to the conclusion that men and women should be inducted in equal numbers. Equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively. The Administration's firm policy is that women will not be assigned to units in which close combat would be part of their duties. At the time of mobilization, the criterion of military efficiency will determine how many women will be used. The rate of induction for women as well as men will be determined by military need.

We believe that the Military Selective Service Act should be amended to provide authority to register women as well as men and we urge your support of this important element of Selective Service Revitalization.

REGISTRATION OF WOMEN

Statement of
Robert B. Pirie
Assistant Secretary of Defense
(Manpower, Reserve Affairs and Logistics)
and
Dr. Bernard Rostker
Director, Selective Service System

Before

The Subcommittee on Military Personnel
Committee on Armed Services
House of Representatives

March 5, 1980

INTRODUCTION

Mr. Chairman, Members of the Committee, it is a pleasure for Dr. Rostker and me to appear before you to report on the President's recommendation that women should be included in the draft registration process.

The Defense Authorization Act for FY 1980 called for the President to send Congress a plan for the reform of the Selective Service System. The Congress asked for a review of ten issues. One of those issues was whether women should be subject to registration and induction for training and service under the Military Selective Service Act. In his response to the Congress, the President announced that he has decided to seek the same statutory authority in regard to women as is now the case for men: authority to register, classify and examine women for service in the Armed Forces.

BACKGROUND

There are 150,000 women serving successfully in the active Armed Services today and by 1985, it is estimated that there will be approximately 250,000 women in the Armed Forces. The Reserve Forces now have about

60,000 women serving with projections of about 100,000 by 1985. Women in the military today participate in a vast array of occupations. About 60,000 enlisted women hold jobs in historically non-traditional occupations. Large numbers of military women work in occupations such as electronics, communications, navigation, radar repair, jet engine mechanics, drafting, surveying, ordnance, transportation and meteorology and do so very effectively, as has been shown by numerous DOD studies and tests. The work women in the Armed Forces do today is essential to the readiness and the capability of the forces. In case of war that would still be true, and the number of women doing similar work would inevitably expand beyond our peacetime number of one quarter million.

Women have traditionally held the vast majority of jobs in fields such as administrative/clerical and health care/medical. An advantage of registration for women is that a pool of trained personnel in these traditionally female jobs would exist in the event that sufficient volunteers were not available. It would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft only males who would not only require training in these fields but would be drafted for employment in jobs traditionally held by females. A further advantage would be to release males currently holding non-combatant jobs for reassignment to combat jobs.

THE MILITARY REQUIREMENT FOR DRAFTING WOMEN

It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men (ages 18 to 26) is sufficiently large to meet projected wartime requirements. Furthermore, men, unlike women, can be assigned to any military position, including close combat jobs.

However, women can be used in large numbers in the peacetime and wartime force. The maximum number of

women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as ground combat roles, for men only, and (3) the need to reserve a substantial number of non-combat positions for men in order to provide a pool of ready replacements for ground combat positions.

A change in the Selective Service Act to permit the registration and induction of women would not necessarily mean that significant numbers of women would be drafted. If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly. We estimate that this might require at least 80,000 additional women over the first six months. If there were not enough women volunteers, a separate draft call for women would be issued.

EQUITY

The President's decision to ask for authority to register women is based on equity. It is a recognition of the reality that both men and women are working members of our society. It confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military is no exception. Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated.

Although the equity argument is important, it does not lead to the conclusion that men and women should be inducted in equal numbers. Equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively. Therefore, the Administration believes that the Military Selective Service Act should be amended to provide authority to register women as well as men.

It is in the interest of national security that, in an emergency requriing the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women. The Administration strongly believes they should be available for service in the jobs they can do, just as men will be available for jobs they can do.

HOUSE OF REPRESENTATIVES

STENOGRAPHIC TRANSCRIPT

OF

HEARINGS

BEFORE THE

COMMITTEE ON ARMED SERVICES

Subcommittee on Military Personnel

.....

..... NATIONAL SERVICE .....

IN THE MATTER OF ..... LEGISLATION .....

DATE ..... Wednesday, March 5, 1980 .....

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[1] HEARINGS ON NATIONAL SERVICE LEGISLATION

WEDNESDAY, MARCH 5, 1980

Subcommittee on Military Personnel
of the Armed Services Committee
Washington, D. C.

The Subcommittee convened at 9:30 a.m., in Room 2118, Rayburn House Office Building, The Honorable Richard C. White, Chairman of the Subcommittee, presiding.

Present: Messrs. White, Montgomery, Kazen, Won Pat, Hillis, Nichols and Mrs. Holt.

Mr. White. Good morning.

Today the Subcommittee on Military Personnel will receive testimony on H. R. 6569, an Administration proposal to amend the Military Selective Service Act to allow the registration of women.

Improving the capability of the Selective Service System is an important issue—it is not merely symbolic. The Nation's current manpower structure, the All-Volunteer Force, is seriously deficient in its capability to meet emergency requirements. Peacetime registration will provide a substantial step in improving mobilization capabilities.

The specific issue before the Subcommittee this morning [2] though is what contribution the registration of women will add to our national defense posture. That is the key consideration. We should not spend more money on defense needs than is required.

Although this morning's hearing is the only hearing the Subcommittee has conducted on the legislative proposal to register women itself, we have held a series of hearings on the issue of women in the military in November of last

year, and several hearings that directly relate to the subject earlier this year. The Subcommittee has also asked the American Law Division of the Congressional Research Service to analyze legal precedents relating to the question of registering women, and has also been provided with a Justice Department memorandum on the subject. All of this material contributes to our deliberations on H.R. 6569

Today's hearing will provide an opportunity for the subcommittee to again consider the views of the Administration, and also to receive testimony from public witnesses.

We have a rather large number of witnesses today and the Chair will ask that prepared remarks be as brief as possible and be confined only to the issue of registering women.

* * * * *

[11] We will take the next witness now, The Honorable Robert B. Pirie, Assistant Secretary of Defense for Manpower, Reserve Affairs and logistics, and The Honorable Bernard D. Rostker, Director of the Selective Service System, and Larry L. Simms from the Office of Legal Counsel.

I believe you are the spokesman this morning, Mr. Pirie?

Mr. Pirie. Yes, Mr. Chairman. I have a very brief statement.

Mr. White. We are pleased to have you here.

STATEMENT OF THE HONORABLE ROBERT B. PIRIE, JR. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER, RESERVE AFFAIRS AND LOGISTICS; THE HONORABLE BERNARD D. ROSTKER, DIRECTOR, SELECTIVE SERVICE SYSTEM; AND LARRY L. SIMMS, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. Pirie. Mr. Chairman, I appreciate very much the opportunity to appear before the committee and to reiter-

ate the views on the registration of women which not only I hold but the [12] Secretary of Defense at present holds.

The Defense Authorization Act for FY 1980 called for the President to send Congress a plan for the reform of the Selective Service System. The Congress asked for a review of ten issues. One of those issues was whether women should be subject to registration and induction for training and service under the Military Selective Service Act. In his response to the Congress, the President announced that he has decided to seek the same statutory authority in regard to women as is now the case for men—authority to register, classify and examine women for service in the Armed Forces.

There are 150,000 women serving successfully in the active Armed Services today and by 1985, it is estimated that there will be approximately 250,000 women in the Armed Forces. The Reserve Forces now have about 60,000 women serving with projections of about 100,000 by 1985. Women in the military today participate in a vast array of occupations. About 60,000 enlisted women hold jobs in historically non-traditional occupations. Large numbers of military women work in occupations such as electronics, communications, navigation, radar repair, jet engine mechanics, drafting, surveying, ordnance, transportation and meteorology and do so very effectively, as has been shown by numerous DOD studies and tests. The work women in the Armed Forces do today is essential to the readiness and the capability of the forces. In case of war that would [13] still be true, and the number of women doing similar work would inevitably expand beyond our peacetime number of one quarter million.

Women have traditionally held the vast majority of jobs in fields such as administrative/clerical and health care/medical. An advantage of registration for women is that a pool of trained personnel in these traditionally female jobs would exist in the event that sufficient volunteers were not available. It would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft ony males who would not only require train-

ing in these fields but would be drafted for employment in jobs traditionally held by females. A further advantage would be to release males currently holding non-combatant jobs for reassignment to combat jobs.

It is doubtful that a female draft can be justified on the argument that wartime personnel requirements cannot be met without them. The pool of draft eligible men (ages 18 to 26) is sufficiently large to meet projected wartime requirements. Furthermore, men, unlike women, can be assigned to any military position, including close combat jobs.

However, women can be used in large numbers in the peacetime and wartime force. The maximum number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military [14] positions, (2) the policy to reserve certain assignments, such as ground combat roles, for men only, and (3) the need to reserve a substantial number of non-combat positions for men in order to provide a pool of ready replacements for ground combat positions.

A change in the Selective Service Act to permit the registration and induction of women would not necessarily mean that significant numbers of women would be drafted. If women were subject to the draft, the Department of Defense would determine the maximum number of women that could be used in the Armed Forces, subject to existing constraints and the needs of the Military Services to provide close combat fillers and replacements quickly. We estimate that this might require at least 80,000 additional women over the first six months. If there were not enough women volunteers, a separate draft call for women would be issued.

The President's decision to ask for authority to register women is based on equity. It is a recognition of the reality that both men and women are working members of our society. It confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military is no exception. Since women have proven that they can serve successfully

as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated.

Although the equity argument is important, it does not [15] lead the conclusion that men and women should be inducted in equal numbers. Equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively. Therefore, the Administration believes that the Military Selective Service Act should be amended to provide authority to register women as well as men.

It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women. The Administration strongly believes they should be available for service in the jobs they can do, just as men will be available for jobs they can do.

Mr. Chairman, I have with me Mr. Larry Simms of the Justice Department. As you said, Mr. Simms is prepared to address the issue raised at an earlier hearing with respect to the constitutionality of registration of women.

Mr. White. Do you have a statement you would like to synopsize this opinion and we can go from there?

Mr. Simms. Yes, Mr. Chairman, I can. I have already provided the Staff with a copy of the opinion, which was signed by Assistant Attorney General Farnham, the head of my office, [16] addressed to Deputy Director, White House Office of Management and Budget, on the 21st of January of this year. I can very briefly give you a summary of that opinion.

Before doing so, I would like to note that that is a matter that is currently in litigation before a three judge Federal Court in Philadelphia, the specific issue of the constitutionality of an all male draft.

Mr. White. All male draft or registration?

Mr. Simms. All male registration and draft. In this case the only issue the court can decide is the constitutionality of an all-male registration since there is no current authority to draft.

Mr. White. That is compared to a registration of men and women. That is the issue. Can you register men only?

Mr. Simms. Yes, sir. I have never heard anyone suggest that it would be unconstitutional to your rights to draft women.

Because the issue is in litigation, any comments I have should not be construed as any action on the part of the Department of Justice to litigate that case in the press.

The Department is defending the constitutionality of the all male draft in that case, and I would like to give you a little background of how we view this issue by way of simply referring to the opinion that is a matter of record.

First, in that litigation it is before a three-judge [17] court. The Court of Appeals for the Third Circuit several years ago determined that this issue presented a substantial constitutional question. It was necessary in order to give the three-judge court its statutory jurisdiction that that determination be made. The issue had never been decided by the Supreme Court of the United States on the merits, so we are in an area where we have to raise it solely by analogy to recent and prior somewhat older Supreme Court cases in this area as well as a fair amount of law made in the lower federal courts.

I believe that the most salient point upon which our analysis is based in our legal opinion is that the Supreme Court has shown a great tendency in the area of military affairs to defer to judgments made by Congress. We believe that if this particular issue were to reach the Supreme Court of the United States, which it may well, though not necessarily in this particular case that is in litigation in Philadelphia, that the court would continue as it has, for example, very recently in the First Amendment area, to show great deference to the judgments made by

the Congress. That is not to say, of course, that the Court would accept any judgment and indeed the Court has in the past held unconstitutional judgments made by the Congress in the sex discrimination area, touching on although not central to military affairs.

It is also our belief that because the Court has shown the kind of deferment it has for the judgments made [18] by Congress in this area, the responsibility is all the greater on Congress in considering this issue to consider it wisely and to consider it thoroughly and to make a careful judgment if it decides to either reject or accept the proposal that has been placed before it by the Administration.

In our analysis you will note that in support of the constitutionality of the all male draft we do not call on in any way the legislative history or reasoning of the Congress which in 1949 adopted the law which the Administration is presently urging be changed. The reason for that is very simple. In virtually all of the lower court cases which have reached a judgment on this issue, the legislative history of the 1949 Act has been totally unhelpful to the government in defending its constitutionality.

The reason for that is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature.

What the government has had to do from 1968 up until the present in litigating these cases is work with primarily people in the Department of Defense coming up with reasons why Congress could justifiably and constitutionally have made the decision that it made in 1949, and this is an accepted way of [19] courts looking at legislation.

This issue is now back before Congress, and speaking solely for the Department of Justice as litigator, it should be fairly obvious to this committee that the defensibility of the all male draft is something which Congress perhaps should speak out clearly and formulate the kind of record if, indeed, it chooses to reject the Administration's pro-

posal, which will be helpful rather than hurtful in the litigation.

As a final comment, I would just make reference back to something which I understood Mrs. Holt to say during the testimony of the first witness. The issue is not in the constitutional context, the issue is not whether there is a necessity to draft women, whether there is a military necessity to draft women. That is the burden on the government.

The Department of Justice is under great responsibility to defend the constitutionality of any act passed by Congress. That is the burden we will have to carry. As to whether it can be carried at this point, we believe it can if the factual basis for it is there, and I think that whether it is there is largely a matter within the jurisdiction of this committee and Mr. Pirie and his peers at the Department of Defense.

Mr. White. Well, let me make the comment. Of course, our role is that of guardian of the security of this nation. We are not serving the same purpose you are in that respect.

Mr. Simms. Let me clarify that, Mr. Chairman. The [20] only point I was making there in defending the constitutionality of an all-male draft, what the Department of Justice will have to convince the court of is that there is a military necessity not to register. In this case I am using the draft and should focus on registration. There is a military necessity not to draft women. That is the burden we will carry, and that is the only point I was making.

Mr. White. What if the ERA should be ratified by the respective states? Suppose that does pass, would you have a different view on its vis-a-vis ERA?

Mr. Simms. I would say, Mr. Chairman, that Justice Renquist, who is the head of my office, shortly after the Equal Rights Amendment had been proposed by the Congress, formally advised—I can't remember who the addressee of the opinion was—that in his view if the Equal Rights Amendment were ratified, given the history of that

proposed amendment, an all male registration would indeed be held unconstitutional.

Mr. White. Mr. Pirie, to synopsize again where we were before, your principal thrust is a matter of equity, which this committee in its need for looking out for the national security, our decision, I think, generally is going to be based on the question of need.

Now, as I remember your previous testimony and that of Mr. Rostker, No. 1, at one time you did say it is a matter of security.

[21] Mr. Pirie. Yes. I said I believed it was in the national security interest of the United States to do so.

Mr. White. We are interested in developing a reservoir of manpower for the purpose of quick mobilization and training for the combat army, am I correct on that, Mr. Pirie?

Mr. Pirie. That is the primary need for the initial inputs to the Armed Forces from the Selective Service.

Mr. White. To me the only testimony you gave earlier was that the drafting of women would enable some men to be placed so that they could go to combat.

Mr. Pirie. That is one of the thrusts of our testimony, yes, sir.

Mr. White. But on further questioning, the testimony from you is that the numbers of billets that would thus be affected would be something in the nature of 19,000.

Mr. Pirie. No, that was in response to Mrs. Holt's question about shortage of Active Army personnel now.

Mr. White. That was my question to you. I asked how many people would be displaced to go to combat, and what are we talking about, and you said 19,000.

Mr. Pirie. I am not sure how that came about. 19,000 happens to be the number short in the Active Army today, Mr. Chairman, but we are looking at the possibility of using up to 80,000 or at least 80,000 people out of the first 850,000 inducted, and that turns out to be in the same

proportion as [22] where we will be in the Armed Forces in 1985.

The shortages of men in the Active Army are not the entire story, of course. In spite of efforts to effect a balance, the Army Selected Reserve and Guard are short some 130,000 people, and the Individual Ready Reserve is short some number between 100,000 and 200,000 people. So there are plentiful requirements for men to be released to combat forces.

Mr. White. The testimony has further shown that 95 percent of the positions or MOSs in the services today are open to women.

Mr. Pirie. That is correct.

Mr. White. Well, if you register two million women, and it will probably be four million women in the first year, according to the plan, because you would be calling up two age groups, and the next age group in January 1981, which is six million.

Mr. Pirie. Yes, sir.

Mr. White. But if you register all of the women and the men, and we had a callup for mobilization, there is no way with the present facilities that you could train the women. You couldn't call them because there would be no place to put them for training.

Mr. Pirie. The intention, as I said, Mr. Chairman, is to call as many as could be used by the Armed Forces effectively, and I indicated that is on the order of about [23] eight thousand, and call the difference between the number of volunteers that appeared and the number of positions that were needed.

Mr. White. Women are volunteering very well, and the quality and caliber is very high, and in 1985 they are going to fill something like 13 percent of the billets.

Mr. Pirie. That is correct, Mr. Chairman.

Mr. Rostker. Mr. Chairman, may I try to put the issue of equity in different perspective as it pertains to the Selective Service System? The fundamenal task of the

Selective Service System is to determine in a fair and consistent way who will in a conscription if not all will go. It is consistent to the history of Selective Service that the pool, that the base on which we draw should be as broad as possible, and therefore historically we have registered, with few exceptions, all of the available men in a specific age group.

I am sure that those men who are drafted don't necessarily want to be there. The facts of today, given the size of the pool and the requirements of the Defense Department, is that not all will be drafted. I think it behooves us then to have as large a base as possible commensurate with the jobs that the Defense Department requires to be done, and the skills and abilities of the people who are available to do those jobs. That would be the fairest way in terms of those who go and the fairest way in terms of those who do not go.

[24] I think it is for that reason that the Administration consistent with the philosophy of Selective Service had asked the Congress for authority to create the largest pool possible to spread the burden, to spread the chances of conscription over the largest numbers of people in order that we may meet our manpower requirements in a fair and equitable manner.

Mr. White. Thank you.

Mr. Montgomery.

Mr. Montgomery. I have two questions. Mr. Secretary, you are in charge of the manpower needs of the military, isn't that correct?

Mr. Pirie. I am the Secretary of Defense policy official in that area, yes, sir.

Mr. Montgomery. If we had a mobilization and we had to have a draft, who would be the individuals that you would have to call up that were needed the most?

Mr. Pirie. The immediate requirement is for fillers and casualty replacements for the combat Army.

Mr. Montgomery. For combat Army?

Mr. Pirie. Yes, sir.

Mr. Montgomery. Why do we want to clutter up the situation by talking about women? What we are really going to need, what the military needs now, both the Army and the National Guard, we need men. We need men to fill the combat [25] roles. We don't need women. Why do we want to create a problem? We have a hard enough time to get men in peacetime registration.

Mr. Pirie. Not only will we need to expand combat arms, as I say, that is the pressing need, but we also have to expand the support establishment at the same time because that meets the situation where the combat arms can carry out their function successful, and the support establishment now uses women very effectively, and in wartime I think the same would be true.

Mr. Montgomery. You are saying in court?

Mr. Pirie. The support establishment. And in wartime some women would be needed for that function.

Mr. Montgomery. In past history volunteers are volunteers mainly to get into noncombative support roles, and I don't think you have any problem there.

To the Director of Selective Service, there has been some confusion on the data that was issued by the Selective Service System that registration could be done in seven days. After talking to you and others, I believe you backed off from that seven days that registration could take place, is that correct?

Mr. Rostker. That is correct.

Mr. Montgomery. That ought to be put on the record. Could you tell us briefly about how much time it would actually [26] take, and I think it is a very important point, that we can't just register people in seven days time and get all of the raw data we need.

Mr. Rostker. If I might, Mr. Montgomery, clearly the analysis presented in the draft report assumed that the system was completely established, and that everything in it would work exactly as planned, and you are aware that such a system does not exist today and will take a considerable time to establish. Moreover, the time table was

based upon a number of assumptions which need to be reviewed in the light of comments received from other agencies in our experience in the last several weeks as we plan for spring registration. For example, the January 16th draft that you refer to had a time table that assumed that the registration would be available and we would activate the Postal Service to distribute registration materials, undertake an effective public information program and get the appropriation through Congress in about three days.

Our best judgment today, after intensive work with a number of Federal Agencies, particularly the United States Postal Service, is that even under the best of circumstances it would take considerably longer to activate the system.

Another factor which has come under close examination over the last several months is the movement of completed registration forms from the registration sites to the data processing centers. In the January 16th draft, we assumed that less than [27] 24 hours we could sort at least one million registration forms, move the forms from 34,000 local post offices to 300 regional centers, and deliver them to as many as 13 IRS and SSA keypunch facilities.

Upon further consideration of transportation requirements, the possible impacts of fuel shortages, and the uncertainty of weather conditions, as well as other external constraints, we had to make a substantial upward revision in these estimates.

One may ask, as you have, what if our January 16th estimates are overly optimistic, what is our best estimate today. I would have to say that the experience of working through the detailed plans for this spring's registration and discovering each day holes that need to be filled and are being filled, clearly shows the difficulty of being too specific when making such estimates.

It does seem likely that given sufficient time, sufficient resources, and ability to clearly develop our operating procedures, train people and test our plans, that we should be able to meet the DOD requirements. But our experience since January 16th clearly shows that this could not

be done such that we would have a registration in four days and start to issue induction orders in seven or begin induction itself in 17 days. In other words, under the best of circumstances we believe we are looking at a time that is considerably longer than that portrayed in the draft report.

[28] I would like to put that draft report also in a slightly different context, and that is it was a draft. It was not intended for wide circulation within the Administration. It was not intended for circulation to the Congress: It was intended to be circulated to an inter-agency working group for comments, corrections, and in fact was under revision at the time of the President's announcement.

I am concerned that Members of Congress are taking that report as a definitive statement of actual Selective Service capabilities and are in fact misrepresenting the report in the debate that has ensued. Clearly, Selective Service to date does not have the capability to respond in an emergency. The projected time tables are not definitive, and most importantly no matter how good any time table looks on paper, it is still a contingency plan and can never be equated with the certainties provided by an up and running premobilization registration system.

Mr. Montgomery. Thank you, sir.

Mr. White. Mrs. Holt.

Mrs. Holt. Thank you, gentlemen. Our purpose here is to raise the best military that we can for the least amount of money, and that is the way we look at it. If we listen to the witnesses, not one military witness has said that there is any military reason to register women, and, Mr. Pirie, when I asked you blank face about if it was the best management [29] practice and you hesitated for sometime and then came back and said it was because it was equitable that it was the best management practice. But I think we all realize that it isn't. It is going to create numbers that you can't handle. There is no way in the world that you can take a percentage of women and a percentage of women and another percentage of men and try to sort out. You

are going to be getting more volunteer women than you can possibly use in the support roles.

Now, you say equity is achieved when both men and women are asked to serve in proportion to the ability of the Armed Forces to use them effectively. You get back to the same point there. Somewnere you are drawing the line. If it is unconstitutional not to register them, then it is unconstitutional not to put them out on the front lines whether they are pregnant or whether they are dropping out because they can't cope with it, whether you have the sexual harassment problem that we are trying to fight right now. It does create management problems. I am not saying that we can't overcome them, but that is not the purpose of the military. The purpose of the military is to defend this country, and I think Judge Sirica was absolutely right when he said—and I think you bore that out—it is perfectly right and constitutional if we classify if it is done for the common good of the country, for national defense. When we classify by age, we are not going to say that everybody has got to go. You have the physically handicapped. [30] You can't make this the same thing you have made the school system.

What would you think, Mr. Pirie, if you were going to register, then what would you have, a percentage of women, or would you just say we need a woman in this particular job so we are going to draft this woman if we got to the point where we had to draft? How would you handle it? I can't see how you would handle it logically.

Mr. Pirie. If women were registered, Mrs. Holt, we would have a very large pool of women whose location would be known, and who would be available to be called up, classified and examined in case induction or conscription were required by the national emergency. The Armed Srvices would have to determine the number of women that they needed both for purposes of expanding the forces and support forces and the support jobs that they have to do, and also for releasing men from the support functions to combat functions.

Mr. Rostker. Mrs. Holt, I think it comes back again to the question of equity. There is no question that women who are physically unfit, as men who are physically unfit, would not be drafted. That is a well established principle within Selective Service. There is no question that if there are sufficient volunteers of men to meet the needs of the Department of Defense men would not be drafted, and if there were a sufficient number of women to meet the needs of the Department [31] of Defense, women would not be drafted. But what we are talking about is the act of registration, the act of identifying oneself to Selective Service, keeping Selective Service informed of their whereabouts, so that in a fair and equitable manner, consistent with the needs of the Department of Defense, that we could under those circumstances conscript the required numbers of people.

Mrs. Holt. Do you think there is any military reason to register women?

Mr. Pirie. Are you asking me, Mrs. Holt?

Mrs. Holt. No, I am asking Dr. Rostker.

Mr. Rostker. I believe that the whole philosophy of the Selective Service System is one of establishing a fiar procedure under law.

Mrs. Holt. I am not talking about the equity now. I am talking about producing the best military we can produce, the most managable military, for the least amount of money. It is going to cost more money to register them. It is going to create a bigger pool of people. We are getting all of the fine wonderful volunteer women, who are doing a great job. Do we need to do it for military reasons?

Mr. Rostker. I think it is consistent with the whole structure of our military.

Mrs. Holt. Why can't you say yes or no?

Mr. Rostker. Yes.

[32] Mrs. Holt. If you think there is a military reason, what is it?

Mr. Rostker. I think that the military is a reflection of the rules of our society.

Mrs. Holt. You are talking about equity. I am talking about military.

Mr. Rostker. I don't think you can separate them.

Mrs. Holt. Suppose a man says, "I am not going to go to combat unless a woman goes." How are you going to handle that equity? It has got to be a matter of national policy. It has gotten into politics now. That is absolutely the only reason the President for some reason thinks it is going to make him more popular if we register women, and then says he is not going to put them into combat. I think it is ridiculous. It is not a tenable position, and it is going to cost money that we need to be using in other places. We might not even have to use registration if we could put the money into doing some of these other things we need to do.

This is a decision of the Fourth Circuit:

"After acknowledging that females were performing vital services in the Armed Forces, nevertheless considering the demands of the military service, we cannot say that Congress had no rational basis for the distinction based on sex."

That is a 1975 decision. So I think, you know, they [33] are on good sound constitutional grounds. I think you pointed out that if it is a classification for the national good, then it is constitutional.

Thank you, Mr. Chairman.

Mr. White. Thank you, Mrs. Holt.

Mr. Nichols.

Mr. Nichols. I have one question, Mr. Chairman and Mr. Secretary. Last summer this committee, led by the Chairman, made what we feel was a rather valiant effort on the House floor to pass the registration bill. We had absolutely no help from the Administration on this, and in fact, the Administration at that time, I believe, said that they didn't feel like it was necessary.

Now, what has happened in the ensuing months? Would you spell that out exactly why you felt it was not neces-

sary back in July or August, and that it is necessary now for the defense of this country?

Mr. Pirie. First, I think the most significant reason, Mr. Nichols, is that Afghanistan has happened, and it is very clear to the Administration that it is necessary for us to demonstrate that we cannot allow the Soviet Union with impugnity to carry out such a brutal and aggressive act, and it is necessary to demonstrate that we are willing to take actions which we previously did not wish to take in order to both demonstrate our resolve and to improve the readiness of [34] the Armed Forces. I think that is a very major issue.

Further, as we have gone into the issue of the registration business, as we have been discussing here, it is clear that there will always be a good deal of uncertainty about the operation of the contingency plan to register people. I think it was quite reasonable for us to wish to build that contingency plan, just like now it is reasonable for us to wish to turn that contingency plan, given the nature of the international situation, into a reality, into a pool of registered people.

Mr. Nichols. Let me ask the same question that Mrs. Holt put to the Director of Selective Service. Mr. Secretary, in your personal view do you feel like there is a military need to register women?

Mr. Pirie. Yes, sir, we have women serving very effectively in military positions today. It is quite important to have as wide a possible pool of applicants for a variety of reasons including the military effectiveness.

Mr. Nichols. Well, I happen to believe, Mr. Secretary, that women are just as patriotic as men. I cannot see the necessity for registering women at this time. I believe if we got into a conflict we would have women four deep at the registration booths wanting to serve the country on a volunteer basis.

Mr. Pirie. Yes. I hope we would have men in the same regard.

[35–38] Mr. Nichols. I believe we would.

Thank you, Mr. Chairman.

Mr. White. Thank you, Mr. Nichols.

Mr. Hillis.

Mr. Hillis. Thank you, Mr. Chairman.

Mr. Secretary, you stated in your earlier testimony that there are approximately 150,000 women, I believe in active service today, and it was projected by 1985 that perhaps this number would go to 250,000, is that correct?

Mr. Pirie. Yes, that is right.

Mr. Hillis. And whether or not we have registration these women, it is anticipated that that 100,000 gain will be made through enlistment by volunteers, is that correct?

Mr. Pirie. Yes, sir, enlistment by volunteers and by keeping people in who we have now.

Mr. Hillis. Retention and so on, but there will be an increase and that will be brought about through an appeal to the young women of America to enlist and serve their country, is that correct?

Mr. Pirie. Yes, sir.

Mr. Hillis. Now, has your office or someone in your area made a study of what the manpower and womanpower needs might be if we in the foreseeable future had to go to an even larger military force or toward mobilization in a national emergency?

[39] You project a figure higher than 150,000. My colleague said the figure of 300,000 was used in World War 2. What is your upward projection in case of a national emergency?

Mr. Pirie. Mr. Hillis, we estimate that we would need 650,000 individuals to be inducted over the first six months.

Mr. Hillis. How many of those would be women?

Mr. Pirie. At least 80,000, Mr. Hills.

Mr. Hillis. That is even if we had the 250,000, you are talking about another 80,000, which projects into about 330,000?

Mr. Pirie. Yes, sir.

Mr. Hillis. That would be a realistic figure for us to meet an emergency mobilization in this country, is that right? How many people are you talking about when you say register women?

Mr. Pirie. The cohorts are roughly two million men and two million women per year in each group. So that for the first two year groups, we are talking about four million men and four million women.

Mr. Hillis. So you are going to register four million women to perhaps—hopefully we wouldn't want to have to draft anyone, but to meet our needs perhaps to raise womanpower needs of 80,000?

Mr. Pirie. That is correct.

Mr. Hillis. That is a very, very small fraction of a [40] percentage, is it not? Don't you think 80,000 could be met by volunteers?

Mr. Pirie. It is pure speculation on my part, Mr. Hillis. As I said to Mr. Nichols, I would hope that we would have both adequate men and women volunteers. We can't be sure of that.

Mr. Hillis. We are staying out of the social issues here. I regard equity as one of them perhaps defining this need. You talked about 95 percent of the jobs young women can do. I think this is very good.

I know I was at the airbase in my district the other day, and the first person I spotted overhauling an engine was a very attractive and very well trained, obviously, young person, who was a woman. In checking with the shop foreman he said she was one of the best mechanics he had in the shop.

The point I am getting at even with that 95 percent that only leaves 5 percent that are closed to women, and in those 5 percent combat MOS's, that is where really the great numbers of people are required in that 5 percent. Do you have those figures?

Mr. Pirie. I can suppose those figures for the record, but it is true to state that the bulk of the people in the

Armed Forces—not the bulk of them but a very large number of people in the Armed Forces are in the MOS's that are suited to women with combat skills.

[41] Mr. Hillis. Artillery personnel.

Mr. Pirie. Exactly.

Mr. Pirie. And this is where the great numbers are required.

Mr. Pirie. Yes.

Mr. Hillis. So unless Congress changes the social policy as to that five percent, it is conceivable that the numbers that we are talking about here today, which was originally 100,000 and has gone to 250,000, and then has gone to 330,000. That isn't going to change until we make the policy change on the five percent that are closed on the MOS's.

Mr. Pirie. I think we are on the path toward this 250,000 women, which is 13 percent of the Armed Forces, which is prudent and which will tell us and allow us to observe them and use them effectively, and tell us whether it is possible to use them all or whether that is the right number. We have to find that out. I would not rule out using women in the Armed Forces, but that is our plan for increasing women.

Mr. White. I want to emphasize one point. The question before the committee is whether or not to register women at this time, and why I emphasize those words is this does not preclude us at some time down the line when we think the need does arise to reinstitute a registration for women, and, Mr. Simms, I would like to say this: Your burden of proof [42] as you say, would be to show that it is not necessary to register women at this time and put it in the negative rather than to say whether it is necessary, to say it is not necessary, and I point out these things to see whether or not you feel this would help to clarify your burden of argument that the evidence is very clear before this committee that registration now, standby registration now, of young males is to provide a reservoir to train for combat in the event of mobilization and the evidence is

very clear from all official witnesses and almost all of the other witnesses—maybe there is one witness who has a different opinion—but otherwise, the overwhelming evidence was there is no intention to put women in combat roles, and therefore I would say this would serve your burden of providing there is no need to register women at this time.

Mr. Pirie. Let me address that by saying at first it is the opinion may office gave, and OMB indicates, we think the real linchpin of our country's defense is directly tied to the proposition that as a constitutional matter Congress may prohibit women from serving in combat. Everything relates back to that proposition.

Let me answer your question by contraditing the kind of approach that you are suggesting with the kind of approach that the Administration is suggesting, and going back to the opinion that Mrs. Holt alluded to earlier, the case of Owens versus Brown. In that case Judge Sirica held unconstitutional assignments [43] across the board for military duty. Judge Sirca held that unconstitutional. He said that that particular provision was unconstitutional because it was not directed at enhancing military preparedness because the sweep of the prohibition was purposely extended to cover both combat assignments and noncombat assignments.

Analytically speaking, purely as a lawyer, the burden is on the Justice Department to defend all male registration which is on its face vulnerable to the same kind of attack and same kind of decision made by Judge Sirica in Owens v. Brown is very heavy. That is why I say that the burden on Congress and the burden of the Justice Department is over the years trying to convince the Court and Congress to show why women should not be registered. There has to be a link in our feeling to the combat situation.

The way the Administration proposes to make that link is, register women (No. 1) and then (No. 2) based on current military assessment of their needs for men to fill combat situations, they will draft women accordingly. There is no doubt in my mind that that process would be

held constitutional. That would be a contemporaneous decision based on military necessity, which I have no doubt could be defended.

Mr. White. But in the negative though, that the Congress opts not to register women, then I think we would be on firmer ground with the court, and especially in the light [44] of the history of volunteering of women who have fulfilled the necessary roles.

Mr. Simms. Let me answer that very briefly, Mr. Chairman, the constitutional attack on the all-male draft is not coming from women. That seems to be a wide misconception. The constitutional attack on the draft is coming from men who simply don't want to serve. I assume that is their motivation. They are invoking their constitutional privilege. That is, most men simply do not want to serve the military.

You raised earlier the question of military necessity, and I don't mean to say this in an alarmist fashion, but if the Supreme Court were finally to strike down all male registration, the result of that decision would not be met by virtue of that decision on registration of women, but rather there would be a strike-down of the statute, and perhaps it would invalidate an entire registration of males program that had been in effect.

Now, I don't say that categorically. It is hard to tell how they will deal with that issue. Certainly they will be uncomfortable with it. So it can be said from a purely legal standpoint that somewhere down the road, and again, the counters to the service laws normally may only be brought by people who refuse to set forth, and with the odds of getting a tentative decision in the court case, in my view, are very slim because of the jurisdiction problem in the case, which means that we are dealing at the very least with an uncertainty in the [45] area of military affairs, the importance of which this committee clearly appreciates. I think that ought to be clearly understood.

Mr. White. But the other precedents you have cited in your brief consistently hark back to Congress as being those who are the best judges as to the national security

needs, and I think if there is a question of uncertainty, I think it is well that the courts make the decision, and maybe it needs to be clarified. That is your job and you do it well.

Mr. Simms. Unfortunately, the legislation occurs in a context in which there are very well established rules about who can bring a suit and who cannot bring a suit, and we live with that body of law the same way plaintiffs do.

Mr. White. Tell me, maybe a law could be passed with wide-sweeping scope and implication that hasn't been tested in the courts. Even if we passed the registration of women, it would be tested in the court.

Mrs. Holt. Will the gentleman yield? I think the big point is—and you pointed out so well—the courts have referred to the military to defend this country. They are the ones that have to make the decision about it through us, through the decisions that we make, and I think that is where it turns. They feel that we can classify according to any of these things if it is for the common defense of this country. I think that is where the whole point turns. We haven't had [46] one military—I don't remember—I haven't heard one service chief or anybody say that there was any military need to register women. This is a civilian deal. It is not really the military feeling at all.

Mr. Simms. One factor which we did discuss in the last part of our opinion, Mrs. Holt, is the fact that ever since this three-judge court case was filed in 1970, the evolution of the Supreme Court's interpretation of the equal protection clause as applied to sex discrimination has been sort of extraordinary—would be a good word for it. It has come a long way, and the Justice Department, although we will make every conceivable effort to defend the constitutionality of the existing law, as I stated earlier, we can use all of the help we can get, and let me reemphasize the fact that the courts have shown a great deal of deference to Congress takes no responsibility whatsoever off of your shoulders and the Administration's shoulders now to

address these issues very squarely and resolve them as they should be resolved.

Mr. White. I think we have made a pretty good record for you, and if you are looking for back-up information or evidence, I think it is there throughout this hearing. Don't you feel so, Mrs. Holt?

Mrs. Holt. Yes.

Mr. White. Are there any other questions.

Mr. Hogan.

[47] Mr. Hogan. Thank you, Mr. Chairman.

Addressing Mr. Simms again, isn't there a sharp distinction in the sex discrimination cases in the private sector and alleged sex discrimination cases in the military? We have Section 8 of the Constitution facing us squarely, and it is the pregotative of some sitting judge to supercede the Congress in its compelling interest in providing for the national security, and it seems to me that there is a substantial body of law on the books unrebutted which supports that proposition.

Mr. Simms. Let me respond to that by saying first I commend to you Judge Sirica's opinion.

Mr. Hogan. I have read it, Mr. Simms, and I am wondering if it is some sitting judge's prerogative to supercede the opinion of Congress.

Mr. Simms. Well, it always is in constitutional matters because the courts finally decide what the constitution means.

Let me also say this sharp distinction you are talking about is not quite as sharp as I wish it would be from the standpoint of somebody trying to defend the Selective Service Act of 1949. Indeed, the language that we rely on most heavily in our opinion, Mr. White, from Schlesinger vs. Ballard is clearly different in that case, and it says in an opinion issued by the Supreme Court that not one of them has suggested that it ought to be a decision based upon defering to military needs.

[48] So, while we are prepared to make that argument, I am not nearly as confident and I don't think the sharp distriction you are talking about has been drawn in any court cases of which I am aware.

Mr. Hogan. Thank you.

Mr. Wincup. I have two areas I would like to ask about. I am interested in your 80,000 figure. The testimony has been offered to this committee in a number of cases your requirements are for 100,000 in 60 days and 160,000 in 180 days. Those numbers are not based on how many people we need; they are based on how many people we can train during that period, essentially the size of the training bases.

Mr. Pirie. The initial constraints are to startup of the training bases in terms of the strength of six months, and things of that kind relate to other things, including the activation of the production base, the availability of weapons, and things of that kind.

Mr. Wincup. But the training base is a limiting factor insofar as the requirements are concerned?

Mr. Pirie. That is one of the considerations that was taken account of in the formulation of the need for the 100,000 by M plus 60. That assumes that the training base and the Selective Service team all start from the same point at M day. It is quite conceivable to me in the period of rights and retentions, the President can start the training some months [49] ahead of time, in which case the strength would not then exist.

Mr. Wincup. The point is, I guess the shortage that exists in the military in the early period generally over the six-month period is in the combat zone. That is where the bulk of your problem is. I assume the 80,000 you come up with are essenially the non-combat kinds of positions that you would be requiring during that period?

Mr. Pirie. Yes, that is right.

Mr. Wincup. Then is it the Department's position, based on your testimony, that if women are asked to register,

that you in fact draft women to cover all non-combat positions during the course of that period?

Mr. Pirie. No, that is not the case.

Mr. Wincup. If so, why do you choose them over men for those positions?

Mr. Pirie. I think that goes back to two of the arguments, and first is the active argument that you talk about Mr. Rostker brought up.

Mr. Wincup. It hardly sounds equitable.

Mr. Pirie. That is correct, we would choose them for positions that the Armed Forces could effectively use them for, as I said before.

Secondly, as I also said before, it is reasonable in a limited pool to expect people who are trained and have skills that would be immediately available and very useful, such as [50] fire protective skills and medical skills, releasing men who would be immediately deployable.

The problem with the drafted man is that it takes twelve weeks of training to make that man employable. However, a woman who is drafted would require little, if any, training to move into a noncombat job to release a man who had previous training who was immediately deployable.

Mr. Wincup. For this purpose you are saying to release another. That could be a man or a woman.

Mr. Pirie. It could be a man or woman. As I pointed out on some of these things it might take time to train a man whereas if you had a woman already trained in that noncombat skill that would be a plus.

Mr. Wincup. Let me ask, if I might, Mr. Simms, the point about the government's burden in the cases that you are addressing. You have said that the argument is the combat in the statute. If Congress were to take action and would permit the registration of women, albeit ultimately for a draft, I think you would have to admit that the combat exclusions in their current form only apply to Navy and Air Force, there is none for the Army and in a sense for the Marine Corps, and they are not as clear as they might be in terms of introduction of women in combat. If

the registration of women were permitted, would it make your burden more difficult?

Mr. Simms. If the registration of women were permitted [51] there wouldn't be any law suit until such time as the male challenged his being sent into combat, and we have no doubt that that can be defended, not just the statute that you are talking about but the policy which supplements the statute for the two services, which I assume are not effectively covered by the statute.

We have no doubt about our ability to defend the proposition that women shall not serve in combat, but the problem is to net the two notions. That is what you ought to be focusing on, is how do you relate your decision not to register women if you want to put it that way. I will put it in the negative, to this proposition that women can in fact be precluded from being assigned to combat.

Mr. Wincup. And it is your opinion that the fact that the latest expression of Congress on the subject was to permit women to be registered would have no effect on that?

Mr. Simms. None whatsoever.

Mr. Montgomery. Mr. Chairman.

Mr. White. Mr. Montgomery.

Mr. Montgomery. Mr. Simms, in the past have the courts considered in their decision really what the nation needs and the military needs in the survival of the nation? In the opinion of the courts, do they consider that when ruling on the constitutional law?

Mr. Simms. Certainly that kind of notion of the survival [52] of the nation is a concept that I think is subsumed within the courts generally in deference to decisions made by Congress in the area of military affairs, the same way as when the President assumed his Commander in Chief powers, the courts tend to show a great deal of deference to that assertion also. The courts simply try not to meddle in military affairs when they can possibly avoid it.

Mr. Montgomery. Thank you.

Mr. White. Not to prolong your presence here, but, Mr. Rostker, I understand you had tightened up the proce-

dures that are contemplated for registration, and with your permission I would like to have you announce for the record, since we have heard your testimony, your new regulations will require face to face registration, of course, at a post office. The individual will come in and sign his name and will provide an identifying number, whether it is social security or whatever form of identifying number that he has in the absence of a social security number, is that correct?

Mr. Rostker. That is correct.

Mr. White. Is there anything further at this time that is contemplated to identify that person?

Mr. Rostker. We will control the distribution of the registration material, and we will require that the individual provide us with their social security number and provide us with positive identification.

[53] Mr. White. Or if he has no social security number, some other identifying number.

Mr. Rostker. Exactly, and the registration forms as they are being designed today has a check-off to indicate that positive identification was received by the postal clerk, who will examine the material, check it for correctness or legibility and then we will through the procedures established forward it to Selective Service.

Mr. White. We appreciate your coming today, and there being no further questions, we thank you very much for your apearance.

Mr. Pirie. Thank you, Mr. Chairman.

Mr. White. Our next witnesses are Mr. David Landau and Ms. Diana Steele, from the American Civil Liberties Union.

Mr. Landau, I note that you have a rather lengthy statement, and we are trying to confine the witnesses as best we can to shorten their time so that we can get all of the witnesses in. Would you like to have this placed in the record and summarize it?

Mr. Landau. Yes, please.

Mr. White. The entire statement of Mr. Landau and Ms. Steele will be placed in the record at this point.

(The statements are as follows:)

STATEMENT BY
ROBERT B. PIRIE
ASSISTANT SECRETARY OF DEFENSE
(MANPOWER, RESERVE AFFAIRS, & LOGISTICS)
BEFORE THE
SUBCOMMITTEE ON MILITARY PERSONNEL
COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

WOMEN IN THE MILITARY

13 NOVEMBER 1979

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
HOUSE ARMED SERVICES
COMMITTEE

ROBERT B. PIRIE, JR.
ASSISTANT SECRETARY OF DEFENSE
(MANPOWER, RESERVE AFFAIRS AND LOGISTICS)

Mr. Robert B. Pirie is Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics).

Mr. Pirie attended Princeton University and graduated from the U. S. Naval Academy. He received a B.A. and M.A. from Oxford University, England, as a Rhodes Scholar.

Mr. Pirie was a career officer with the U.S. Navy from 1955–75. He served in various capacities on nuclear submarines, culminating his service as Commanding Officer of U.S.S. Skipjack. From 1966 to 1969 and from 1973 to 1975, he served on the staff of the Secretary of Defense. In 1972 and 1973, he was on the staff of the National Security Council. In 1975 Mr. Pirie became the first Deputy Assistant Director for National Security of the new Congressional Budget Office. He served in that position until June, 1977, when he accepted the post of Principal Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs

and Logistics) with the Office of the Secretary of Defense. On February 14, 1979 President Carter nominated Mr. Pirie to be Assistant Secretary of Defense.

Mr. Pirie is a recipient of the Legion of Merit and the Meritorious Service Medal for his services in the Office of the Secretary of Defense, and of the Meritorious Service Medal for his work on the National Security Council staff.

Mr. Pirie, his wife Joan, and three children live in Bethesda, Maryland.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

vs.

CURTIS TARR, ET AL., DEFENDANTS.

Washington, D. C.
Tuesday, May 13, 1980

Deposition of

BERNARD D. ROSTKER

a witness, called for examination by counsel for the plaintiffs, pursuant to notice, taken at the Selective Service System, National Headquarters, 600 E Street, Northwest, Washington, D. C., beginning at 4:08 p.m., before Rebekah J. Johnson, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[6] A It was to provide a firm basis on which the Selective Service could respond in a national emergency to the manpower requirements forwarded to us by the Secretary of Defense or by the Assistant Secretary of Defense for Manpower.

Q And in terms of performance objectives, what was the revitalization intended to accomplish?

A The revitalization of the System was intended to accomplish, at a minimum, the provision by the Selective Service to the Department of Defense first inductees on M plus 30 days; 100,000 on M plus 60 days; and 650,000 inductees within six months. Those were the minimum per-

formance goals forwarded to us by the Secretary of Defense.

Q And at the time you were preparing the revitalization, was there any consideration of the registration of women for the draft?

A Yes. The questions addressed to the Selective Service System included a question upon the registration of women. We participated in the staff debates on that issue.

Q What staff?

A Within OMB and Defense. In early February, the President announced the Administration's position on the registration, and in the event of a national emergency a [7] return to conscription, the conscription of women.

Q When was that?

A In early February.

Q Who within your office participated in those debates in responding to the question concerning women?

A I am the one who is responsible for the position of the agency with regard to policy. And my position was favoring the registration and the induction of women in limited numbers to meet the requirements posed by the Secretary of Defense for women.

Q And what were those requirements?

A The Secretary of Defense, through the Assistant Secretary, stated that of the first 650,000 inductees they desired us to provide 80,000 women. That would be 80,000 within six months. The program they laid out to us would require us to provide 20,000 a month starting the third month, and we would provide 20,000 the third, fourth, fifth and sixth months.

Q Now the 650,000 figure and the 80,000 figure, were those to include voluntary enlistments as well as inductions by conscription?

* * * * *

Q So that administratively if Defense asked for its 650,000 total, 80,000 female complement, within six

months, do you believe that you would be in a position to make the deliveries starting with the first person as of M plus 30 without respect to sex?

* * * * *

A If the Congress provided the legal authority for me to register women, if the Congress provided the financial means by which we could carry out a registration of women both in terms of the allocation of funds and providing no restrictions of the use of those funds for that purpose, we believe we could build a system that would allow us to meet [18] any deliver schedule that Defense would give us in the general realm we have been talking—the first, 30 days; 100,000, 60 days; 650,000 in six months. We could meet that schedule and provide any proportion of the women that would be required.

* * * * *

[24] A As a manager of this program responsible to the Congress as well as to the Administration, I could not do it without: (1) the enabling legislation, and (2) explicit allocation of funds. We are talking roughly about $2 per person for us to accomplish a registration. So if we were to [25] have a registration of a single year group, roughly two million females, we would need an allocation of about $4 million. If we were to put males and females on the same foot, which according to our plan we would register females born in '60 and '61, that would cost us $8 milion. We would have wanted to do that this year. Next year, we're planning to register males born in '62. That is costing $62 million. And if the Congress provided the authority and the dollars to register females, we would have needed $2 million more dollars. With males we would expect to go on a system of continuous registration. There are approximately two million males in each cohort. That would be approximately $4 million. If we were to extend the same program to females, namely 18-year old continuous registration, two million in that cohort, we would need an allocation of $4 million more per year, approximately.

* * * * *

[43] MR. WEINBERG: I am asking for operational impact if you were granted the authority.

THE WITNESS: I think there's two questions. One is what would happen if we had to cease inductions because of such a finding? Obviously we would cease inductions. The system could not operate. We would fail our mission.

Then there was another question, what would happen if we were told by the courts to register women? It has been the position of—is the position of the Administration that we want to accomplish registration in a premobilization period so that we may do it in a less disruptive fashion, so that registration would go smoother than it might in the hectic days of a mobilization. If that logic is correct for a male registration, it should also be correct for a female registration. If I have accomplished the registration of men in a premobilization period, it would be disruptive of the system to have to accomplish a massive registration of women in a post-mobilization environment.

* * * * *

[45] Q And is the position of the Selective Service System that the risk that the authority to register and later to draft males may be overturned a risk that your organization would rather have determined in a premobilization situation than in a post-mobilization, during mobilization?

* * * * *

[46] THE WITNESS: The more that we can accomplish in peacetime, consistent with judgment as to cost and effectiveness, the more we can accomplish in peacetime would therefore make it more likely that the system would run smoothly in time of national emergency.

BY MR. WEINBERG:

Q And would the Selective Service System prefer to have the question of whether a male only draft is constitutional decided in a pre-mobilization situation?

* * * * *

A I know the question. But I think my previous answer was, in fact, the right answer. I in no way wish to dictate to the courts when they should hear something. I would only [47] say that the less uncertainty I have after a mobilization, the easier it would be to run the system.

* * * * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS

vs.

CURTIS TARR, ET AL., DEFENDANTS.

Civil Action No. 71-1480

Suite 708
1776 K Street, N.W.
Washington, D.C. 20006

Thursday, February 5, 1976

Pursuant to notice, the following deposition of PETER T. STRAUB was taken before me, Jerome J. Lazarus, a Notary Public in and for the District of Columbia, commencing at 9:55 o'clock, a.m., when were present on behalf of the respective parties:

* * * * *

[24] Q Have you had occasion to review the history of the Selective Service Act of '67 with regard to whether there was any input from Selective Service concerning the issue of a male-only versus a male and female conscription system?

A Yes.

Q What is the result of that inquiry?

A There was no input.

Q Selective Service was not asked to nor did it comment on the question?

A To my knowledge and recollection, it did not.

Q Do you know whether anybody considered the question of drafting women in connection with the 1967 Act?

A I find no reference to it.

* * * * *

[1] UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

vs

BYRON V. PEPITONE, ET AL., DEFENDANTS.

CIVIL ACTION NO. 71-1480
F.S. 76-0193
MISC. NO. 76-0159

Pentagon, Washington, D.C.
Thursday, October 14, 1976

Deposition of

LT. GENERAL HAROLD G. MOORE

called for examination by counsel for the plaintiffs, pursuant to notice, in the Pentagon, Washington, D.C., beginning at 1:00 o'clock, a.m., before Phyllis E. Jacobs, CSR, a Notary Public for the State of Virginia at Large, when were present on behalf of the respective parties:

[20] units.

We are making an active effort, and have been over three years now, to reduce what we call the tail of the Army, and increase the teeth. We call this a detail ratio.

We are trying to increase the teeth and reduce the tail and all within the same strength authorized by the Congress.

* * * * *

[2] Q Looking now at Annex B to Chapter Four of the Women in the Army Study, which is a list of skills, MOS for temporary closing based on management consideration that gives an MOS title and a reason.

A Uh-huh.

Q Now, the reason for the majority, I think, of the management closures is rotation base.

Do you know what that refers to?

A Oh, yes. Right.

Q Could you tell us?

A Right. This is one I have not described yet, but which does figure greatly in our management consideration for both men and women.

The rotation base in the Army is the United States based units, which sustain overseas operations.

Q Are those referred to sometimes as CONUS?

A Right.

[67] BY MR. WEINBERG:

Q If you will recall, I was looking towards specifical interchangeable slots within the max-WAC percentage, and those could be filled, obviously, by men or women.

That's the only criteria that I was setting, and if it became necessary to fill those slots by conscripts.

A I think we would have to look—I will try to answer your question.

Q Okay.

A We would have to look at the situation which existed at the time; for example, is a war going on? For example, is it estimated that a war is about to start? Is it estimated that some enemy of our country is about to attack us? Are we in the middle of a war?

It seems to me that what would happen, sensibly, is that the Army would take a look at the situation on a case by case basis, and determine, first, whether or not we felt we needed to conscript women.

Q In each of the cases that you have put forth, I take it there would be some evaluation of the max-WAC figure for units based upon the conditions that you have put forth?

A Yes. Right.

Q And that may call for a modification, either upward [68] or downward?

A Yes.

Q A modification of the max-WAC figure?

A Yes. And depending on the location of the particular unit, Mr. Weinberg.

Q Absolutely. It would call for some modification of the max-WAC figure.

A The location in the world of that unit, and the mission of that unit, wherever it is located.

Q Right. And that would yield some revised max-WAC figure for a unit?

A Right. And it could be zero.

Q For that unit?

A It could be no change.

Q All right.

A It would depend on the situation, in short.

Q In our history, at least in our history, as far as you can recall, based on your time in the military academy, and your career since then, is it true that there has never been a time when the female personnel level of the Army as a whole has been zero?

A So far as I know, there has always been some women in the Army.

[69] Q And as you said, there were 300,000-some odd in World War II, and it varies, as you said, depending upon the general situation?

A Right.

Q To the extent that the revised max-WAC figures for the various units of the Army are taken into consideration so that whatever hypothetical situation is, it's already plugged in, and there was a max-WAC figure for the Army as a whole greater than zero?

MR. KELSON: There was not. That was not being met.

MR. WEINBERG: Well, we started off by saying that there was a max-WAC figure that was greater than zero

that was not being met, either by female voluntary enlistment, or a surplus of male voluntary enlistment, such that conscript is necessary to fill those slots which, in theory, are open to either men or women, and in the judgment of the Army, after taking into account all of the factors in the situation as then exists, those slots can be filled by either men or women without degrading the performance of the Army.

THE WITNESS: Did you postulate that (in sufficient) numbers of men being drafted under that assumed condition?

* * * * *

[70] Having already decided that that slot can be filled [71] without detracting from the Army's mission by either a man or a woman, and it must be filled by a conscript, because you are not getting enough volunteers, would it detract from the Army's mission to fill it with a female conscript rather than a male conscript?

MR. KELSON: Objection. I think you are begging the question again. It's improper.

THE WITNESS: I agree with my counsel's objection but I would think what would happen then, Mr. Weinberg, is that the Army would look carefully at the situation and determine whether or not mission accomplishment would be degraded by drafting, by requesting that women be permitted to be drafted, or a law enacted for women to be drafted.

It would depend on the case.

What you must always remember is that conscription is turned to by the Army when it cannot fill its manpower requirements, and authorization by volunteers.

* * * * *

[72] Now, the next point is that wherever males are found in Army units, they all have gone through basic combat training. Women could not go through basic combat training.

Wherever these men have been assigned in the past subject to limitations of medical units and conscientious

objectors who are serving in uniform in medical units and so forth, we have had the capability in the Army times of crises or emergencies to transfer men from what we now call Category II and Category III Units into Category I Units.

We would not have that flexibility with women in battle, whether they are drafted, or whether they are volunteered.

Now, it seems to me that for the defense of the country, that the country should stack the cards in its favor wherever possible by creating conditions where, if necessary, such transfers became mandatory, they could be carried out; and it seems to me that the officials of this country would be limiting such flexibility by being extremely liberal, and women in all kinds of Category II and III Units, either drafted or volunteered.

[76] MR. WEINBERG: (Interposing) That's right.

MR. KELSON: (Continuing)—and may never that a determination be made that a particular position interchangeable, male or female, with no derogation Army mission.

MR. WEINBERG: That's right.

MR. KELSON: That's highly hypothetical, and you are begging the fundamental question.

MR. WEINBERG: There is no fundamental question being begged.

The question of whether a job should be open to females in time of war, and in time of threat, I am leaving firmly in the discretion of the Army. This is not what the suit is about, and it's a misapprehension that I think has been fostered in the papers of the defendants, and it totally misapprehends what the suit is about.

We do not seek to say that you have to put women in combat, or you have to put them in close support, or you have to put them in a helicopter or anywhere else.

* * * * *

[81] A The Army exists in this country to be responsive to the President and the Congress and to the people, and be ready to fight to help defend the country when called on.

I previously stated that the Korean War stated over a weekend, as we know, so we must be ready to fight at any time.

I don't want to leave you with the impression that if suddenly we were attacked this afternoon, that we would look at every outfit in the Army to see if we want to change the women content. Please don't get that impression.

Q I presume the need for quick response has already gone into the fixing of existing max-WAC content.

A That's exactly why we gave it to the headquarters in charge of combat doctrine to study in the first place. That's why we went to field commanders to get their views, the European Army Commander, the Eighth Army, the Korean Commander.

We are doing the best we can to test out their views to see if they are sensible in field conditions.

Q I understand, and I think we both understand that the existing female content is based upon the Army's best [82] analysis now, including the need for quick response.

A And we must be ready to fight.

Q Immediately.

A Whenever, and wherever called on without rearranging a lot of—

Q (Interposing) of Course, and that is part of the margin for safety.

A We call it combat readiness.

* * * * *

[100] with women who want to serve their country in uniform, and we have found that a dedicated female soldier is a very effective soldier.

We have also found that we have no trouble in recruiting sufficient high quality volunteer women to fill the authorized slots, the authorized skills.

The basic reason for conscription is because there are not enough volunteers. Between 80 and 90 percent of the replacements in a wartime situation are for combat arms units.

Q Is that in the initial days, or does that continue through an extended conventional war?

A It would depend, again, on the situation, but let's take a war like Korea or Viet Nam or World War II. I think my figures are generally correct. The need for replacements, the majority of the replacements are needed in the fighting units.

Q And we can say to that over 50 percent?

A I would say over 80 percent.

Q And does that go right through the course of the war, or does that only—

A (Interposing) It would depend on the war.

Q Well, you were saying World War II, Korea, Viet Nam.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GOLDBERG

v

PEPITONE

CIVIL ACTION #71-1480

Pentagon,
Washington, D.C.
October 19, 1976

Deposition of

EDWARD C. MEYER

a witness, called for examination by counsel for the Plaintiff, by agreement of counsel, at the offices of the Department of Defense, Washington, D.C., before Douglas W.G. Blair, a Notary Public in and for the State of Virginia, when were present on behalf of the respective parties:

[7] Q Did any of the plans involving the possible reinstitution of conscription, did the contingency plans call for the stripping down of the non-combat and combat support forces to make up for shortages in the combat support forces? And, to the extent that that can be answered, can you answer yes or no generally, without compromising any classified information? We have had a description from Mr. Ahern very generally of the conscription scenario in a NATO-Warsaw pact [8] confrontation.

A Do you mean in terms of your question is there a plan relating to the use of conscription, or the reinstitution of conscription which also speaks to the stripping of these rear units that you have referred to; is that your question?

Q Essentially, yes.

A The answer to that is no, to the best of my knowledge.

* * * * *

[9] Q Okay, to this question there is no such preface: In terms of contingency planning, do any such plans call for the stripping down, as we have discussed?

A Well, stripping down is a rather vague term. Could your question be more specific? Stripping down of what, to do what?

Q Taking personnel from the non-combat and non-combat support forces and transferring them to combat or combat support forces, in order to make up a personnel shortage in those latter forces.

A It really has not been addressed in those terms, in the terms of your positive question.

Q How has it been addressed?

A It has been addressed in terms of a reliance in future wars in terms of post-nation support to do some of the combat service support roles which still must be done, so that there is no effort to reduce the need for the performing of those missions, and attempting to accept the fact that in future wars they will be part of and in conjunction with our allies, and that we can consider the employment of allies performing the role of combat service support with the U.S. force, therefore, able to focus perhaps the greater extent of [10] its effort in the area of combat and combat support.

* * * * *

[17] A One of the options would be a worst case scenario.

Q Now, by the case of the non-combat and the non-combat support units, finding themselves fighting, are you recommending—

A Sure.

Q —or does your analysis indicate that the female content of the units present in that theater should be zero?

A Again, this is judgment based on my experience. My judgment tells me that the ratio of women in those units in peacetime, as opposed to wartime, the ratio—that is the number of women versus the total, would be higher, much higher in peacetime than in wartime, and it questions whether or not having women in some of those units at all, does not create such a tremendous management problem that it would not be a feasible alternative in wartime.

Q You are saying in some of those units. Does that mean that you are focusing on a specific set of those units or taking them as an aggregate manpower pool? I'm not sure, again, quite where your analysis is focused.

A My analysis is focused on all of those units. The reason it would be difficult to be absolutely specific is because I haven't thoroughly analyzed the situation so far as

* * * * *

[18] That is why I say I don't really know. Traditionally there have been some women drivers, and things like that in "a broader theater", but it would be difficult, indeed it would be almost impossible, in my view, the management of [19] people at that critical point. I just see the next war as being so demanding that anything that complicates the management of the people in an early stage would make it nigh on impossible to be effective.

Q I am still looking for a little more clarification on your reference to some units within the combat theater, and I am not sure whether you are saying that the presence of any women in any units would have the same inhibiting effect upon effective management, or—

A I would say that any women in any units would have this effect on management. It would just be a flat difficulty of management.

Q To a point where there is a reasonable possibility of it actually impinging upon the ability to get the job done?

A Yes, I would say that.

* * * * *

[27] Q Would the management problems that you are referring to be impacted either favorably you wouldn't be considering career aspects or unfavorably for any reason, if you were talking about dealing with conscript, non-career women rather than enlisted volunteers?

A No.

Q It is strictly a question of men versus women on the management issue?

A Yes.

* * * * *

[44] Q Now, the opinions, or judgments as you call them that you have been giving us so far. To what extent is that official Army doctrine, or are we talking about your own expertise?

A I think in the area of the role of women in wartime in the complexities that the conscription of women would place on our management system, I think that in those areas that the Army has, perhaps not thought through those full [45] impacts to the degree that I have preferred them today, but that, in my job where I have the responsibility for looking ahead and thinking ahead my personal judgments on it will be influential based upon my ability to articulate those views in the future.

* * * * *

[53] training of women as opposed to men in the United States Army?

A Yes

Q I believe General Moore previously addressed those differences.

Sir, regarding the European war scenario, concerning the combat losses in such a situation, do you have any ability to compare those combat losses and their attempt to meet with historical data from World War II, or perhaps the Yom Kippur War in 1973?

A I would say that in any future war in Europe would be one in which a number of losses are going to be orders

of magnitude above what they were based on historical data from World War II.

Q Going to the Yom Kippur War, in 1973, I believe there were hundreds if not thousands of tanks lost on either side within a very brief period of time. Would you be able to speak without breaching classified material as to how the loss rates in this war scenario that you have been speaking of would compare to that?

A Well, all the loss rates are the result of the increased lethality of weapons, and this indicates that there [54] would be greater losses both of material and manpower.

MR. WEINBERG: Greater than what?

THE WITNESS: Greater than the historical data that we have been using to determine our requirements in the past.

BY MR. KELSON:

Q That is true either in terms of World War II as a point of reference, or the Yom Kippur War?

A That is true in terms of reference of World War II, and the translation of World War II data, based on the Yom Kippur war experience.

Q And this high order of magnitude in the losses of material and personnel that you speak of would be what you speak of when you talk of crisis management?

MR. WEINBERG: Objection as to form.

Incidentally, John, you are here representing the witness and also the defendant, is that correct?

MR. KELSON: That is correct.

THE WITNESS: Yes, the increased lethality would cause these high loss rates.

BY MR. KELSON:

Q But my question is relating to the term crisis management. In what context did you use that term?

[55] A In terms of increased dynamics, based on increased lethality, and so forth.

Q Sir, in the circumstances where conscription might again be re-instituted, and more specifically the European war scenario, do you have any opinion as to the price that might be paid by the conscription of women in terms of casualties?

MR. WEINBERG: Objection.

BY MR. KELSON:

Q Or losses?

MR. WEINBERG: In reference to what?

MR. KELSON: I just referenced female conscripts by the United States Army.

MR. WEINBERG: But how would they be used? Would they be used in the front line, or posts back in the United States, compared to male volunteers? I don't understand the question.

MR. KELSON: If that is an objection, it is noted for the record.

MR. WEINBERG: It is an objection.

THE WITNESS: I guess, in the broadest terms, which would identify the conscription itself, it would appear to me [56] that the price you would pay using your terms would be the decreased effectiveness of the overall force.

MR. KELSON: I have no further questions.

REDIRECT EXAMINATION

BY MR. WEINBERG:

Q But that price you are referring to, would it differ, depending on how many female draftees we used?

A Well, I don't think so, because the management issue, as I have indicated before, yes, I think it can be broken down in scale, but there is the "a price that you pay".

Q Would the price vary, depending upon how many female draftees we are talking about?

A Well, if you are going to refer to one or—two, then I would have to say that the price would be less.

Q And would that price differ if you were talking about, instead of using female draftees, using female enlistees in the same position, trained at the same bases? The price would be based on the fact that they were female, rather than conscript volunteers?

A No, based on the fact that they are conscripts would cause complications for management, which has been really the thrust of my personal concern.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

vs.

CURTIS TARR, ET AL., DEFENDANTS.

Washington, D. C.
Tuesday, May 13, 1980

Deposition of

ROBERT B. PIRIE

a witness, called for examination by counsel for the plaintiffs, pursuant to notice, taken at The Pentagon, beginning at 12:15 p.m., before Rebekah J. Johnson, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

* * * * *

[4] Q Mr. Pirie, what is your present position?

A I am Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics.

Q How long have you been in that position?

A I have been in that position 11 months.

Q And prior to that you were?

A Prior to that I was acting in that fashion for about six months.

Q That would take us back to about January of '79?

A Yes. Actually November '78.

Q Prior to that?

A Before that I was the principal Deputy Assistant and all of that, and had been so since June 1977.

* * * * *

[5] Q Prior to being principal deputy, did you have any other employment with the Defense Department?

A I was for 20 years a career officer in the Navy and retired in July 1975. So I had some acquaintance with the Defense Department.

Q During your Navy years, did you have any assignments at the Department of Defense?

A Yes, I had an assignment here from 1966 to 1969.

Q As what?

A In the Office of the Assistant Secretary of Defense for Systems Analysis, as a staff analyst, and an assignment from October 73 to July '75 as the Acting Deputy Director of Net Assessment.

Q What did you do as Acting Deputy Director of Net Assessment?

A Assisted the director in establishing a mode of analysis for assessing status of defense programs that [6] emphasized comparing U.S. forces with Soviet forces in a variety of ways, supported the Secretary of Defense in assessment of strategic balance of forces in Western Europe—it was thought to be a very useful new mode of analysis—and to provide insights into our defense problems that are different from those provided by traditional systems analysis, operations, research and other things.

Q In your present position and your previous positions since November of 1978, have you had any role in developing the policy of the Department with respect to the registration or potential registration or conscription of women?

A Yes. In my present position, I think that is one of the areas in which I am responsible for advising the Secretary of Defense as to what position he should take.

* * * * *

[10] Q One of the statements made in your prepared testimony is that the work women in the armed forces do today is essential to the readiness and capability of the forces. In case of war that would still be true, and the number of women doing similar work would inevitably expand beyond our peacetime number of one quarter million. Were you questioned concerning the origin of the figure one quarter million?

[11] A No.

Q What does that one quarter million represent?

A One quarter million represents the program number of women in the armed forces as a whole at the end of fiscal 1985.

Q And that still is the expectation of the Department?

A Yes. We plan to reach that number.

Q And would that expectation be affected one way or another by whether the proposed registration for possible conscription is funded by Congress?

A No. That number is not based on considerations arising from the registration one way or the other.

* * * * *

[12] A The Department has been explicit in public testimony that we cannot fight a war with a volunteer Army, we would immediately request authority to resume the operation of the Selective Service System in a national emergency.

Q So that when you say in case of war, it would still be true that the women in the armed forces are doing work essential to the readiness and capability of the forces and that the number doing similar work would inevitably expand beyond the peacetime number, that is in full contemplation of there being a draft during the war situation?

A Yes.

Q Now on page two of your prepared testimony, you comment on the advantage of registration of women because it would provide a pool of trained personnel in areas where women have traditionally held the majority of jobs.

When you say where women have traditionally held the majority of the jobs—such as administrative, clerical, health care medical fields—are you talking about women in the military or women in society at large?

A Women in society at large.

Q So that the pool of trained personnel from which the [13] military could hope to obtain those same skills for its expanded needs in war time would be primarily a female pool?

A Yes. To the extent that that is true of the society at large, yes, that's true.

* * * * *

[14] Q You stated in your prepared testimony that it would make far greater sense to include women in a draft call and thereby gain many of these skills than to draft only [15] males who would be drafted for jobs traditionally held by females. Were you questioned with respect to that statement?

A I was not question with respect to that. I was not.

Q Was anybody? It says here statement of yourself and Mr. Rostker. Was Dr. Rostker questioned with respect to that?

A No, that really doesn't fall in his province at all. It was my business to be defending that side of the point.

Q You say you weren't questioned. Was there comment from the committee on that point?

A I guess you would say obliquely. The committee questioned me, as they had at the previous hearing, with respect to whether this was the most efficient way to conduct a draft call, and I replied that I thought it was, in view of the fact that it would give us the maximum flexibility to employ people in the skills available from the skill pool.

Q In any such draft call which would include both men and women, whom did you visualize ought to control the numbers of men versus women that would be drafted during any one period of time?

A It is primarily a function of the military services to determine how many people of what kinds they need and can [16] employ. So we depend upon them in the first instance to state their requirements.

Q And is it your opinion that the people who would have the best capability of determining the mix of men and women that would best be utilized to achieve the objectives of the armed forces would be the armed forces speaking through the Department of Defense?

A Yes, I think that's fair to say.

Q And is it fair to say that to the extent that you are prohibited from inducting women to fulfill the role that you envision in your testimony, that that prohibition interferes with an optimal access of the military to the available skills in society?

A It—to the extend that volunteers do not fill the needs—

Q I am hypothesizing a need for conscription all across the field.

A The committee appeared to feel that there would be more volunteers than we could handle. My point made there is to the extent you don't get these volunteers, that what you would be doing is taking in men who aren't trained and training them to do a job that you could take in a women to [17] immediately.

Q And during the time that you were either with the Navy or the Department of Defense, has it been your observation that conscripts have been used in administrative, clerical or health care medical fields within the service?

A Oh, yes.

Q And did that situation obtain during both peace and war?

A Yes.

* * * * *

[18] Q Now does the Department of Defense study a broad range of possible future scenarios which would require some [19] response by the armed forces?

A Oh, yes.

Q Are there some contingencies for which you plan which would require a very large and very sudden increase in the number of people in combat jobs?

A Yes.

Q Now would that include situations where the necessary increase would be beyond the scope of present reserve units, both in terms of numbers and in terms of preparedness and training?

A In terms of numbers, surely. In terms of preparedness the reserves are the —indeed, our reserves are expected to be part of the first line. Many of our reserve divisions are expected to be deployed to Europe in the first 30 days of a war with the Soviet Union, for example. So in terms of preparedness, the reserves are expected to be very ready, unprecendentedly.

Q And the problem would be numbers?

A Yes, the problem is numbers.

Q Now outside of men presently in the armed forces holding noncombat jobs, is there a large pool of combat ready personnel who could be used to supplement the reserves in one [20] of those situations where the needs for numbers of combat troops exceeded what you had?

A The principal supplement is what is called the individual ready reserve, where people with residual military obligations have an obligation remaining, and that pool would be used to fill out units, reserve units, which would be deployed, and it would be used for individual replacement for combat casualties. Beyond that pool there are other sources, including the so-called standby reserves, who are people with a lesser degree of obligation than the individual reserve, and retired personnel who can be recalled.

Q Retired personnel are generally older?

A Yes, retired personnel range in age from about 37 to very old. But we have very substantial numbers of people who have been retired who are in their late thirties to late forties who have substantial military skills, and the inten-

tion would not be to use these people in combat, but to use these people to supplement the support structure, selectively, and treat individuals who had military training, who would be then trained to deploy to combat.

Q The concept of freeing individuals who are already in the service for combat use is the topic that I am raising [21] here.

A It is very important, because by law we are not allowed to deploy individuals who have been conscripted from civilian life to combat theaters for the purpose of combat unless they have a minimal amount of training.

Q That minimum is specified in the statute?

A That minimum is specified in the statute, and it's my recollection it's 14 weeks. So there is a serious question about what you do between week one and week 14 if you are short people to engage in combat.

Q How soon would you be able to deploy the individual ready reserve and standby reserve?

A Beginning on the first day.

Q And the major scenarios you were describing before, would it be fair to say between weeks one and 14 you would need additional forces or you would anticipate the prudence of having additional forces?

A Yes. Our estimates—well, they are just that, estimates—lead us to believe we are presently short some 120,000 people in the Army, Guard and Reserves, and on the order of 260,000 people short in the individual ready reserve, and those positions are almost exclusively combat-related [22] positions.

A All 380,000?

A Yes.

Q And those are positions that would be necessary to actually fill during that 14-week period?

A Well, if you could not fill them, you would have to change the plan for deployment of forces.

Q In order to fight the war as you would want to be able to fight it, you would need those 380,000 men?

A Yes.

Q Would the ability to fill those 380,000 spots be enhanced by being able to transfer men who were presently holding noncombat roles in the military into the combat arm if you were able to replace them in their noncombat roles with capably trained enlisted or conscripted personnel?

A Volunteers or conscripted, yes, that would be enhanced. People who now have military training are not subject to the 14-week prohibition and could be immediately deployed.

Q So am I correct that people who are presently in the armed forces have all gone through a basic training that would qualify them to be combat soldiers?

[23] A Basic training plus the skilled training which they all go through, yes, that's correct.

* * * * *

[24] Q But in order to meet that 380,000 man shortfall in the combat slots, would the people already in the military in noncombat slots comprise the most readily available source for picking up that shortfall, for meeting that shortfall?

A Yes. The armed forces would, I believe, strip what are called TDA units, that is, units that are not combat-deployable units to provide individuals as fillers.

Q And in terms of continuing to fulfill the overall mission objectives of the armed forces, would the quality of the immediate replacements of those people be an important factor in the TDA area?

A Yes. The TDA units have an immensely important job in themselves to perform because they support the mobilization of the manpower that is to come beyond. That includes organizing and organizing the services of supply, organizing and training the movement of units while they are still in the United States, and a host of different things. So [25] it is very important that those TDA units, if they are used, be supplemented.

Q What does TDA stand for?

A Tables of division authority, or something of that kind, as distinct from TOE, tables of organization and equipment, which are units that have tanks and artillery pieces, and that's the organization and equipment.

Q And in your opinion and in the opinion of the Department, would having women available to fill those TDAs spots enhance the capability of the military to perform its function?

A Yes.

Q And was that the point that you were making when you said in your prepared statement "a further advantage would be to replace males currently holding noncombat jobs for reassignment to combat jobs"?

A Yes.

Q Were you quizzed on that by any panel members?

A No.

Q Was there any statement concerning that position?

A If I remember what was said, I think I mentioned the skepticism of the panel members about the optimal military [26] management and so forth, and in that particular context they came back and said is there a military requirement to draft women? And I reiterated the points I had made in the statement. But I thought that that question was particularly difficult for me to answer.

Q Am I correct that there is no regulatory, recognized job in the military that can be done only by a woman?

A Yes, that's true.

Q So in that sense there is no military requirement to draft women, and that any question about drafting women is in the context, as far as you are concerned, about the need for drafting people for positions which can be filled by either men or women?

A I think that is the right point. There is no military point for drafting left-handed men either.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

vs.

CURTIS TARR, ET AL., DEFENDANTS.

Civil Action No. 71-1480

Washington, D.C.
Wednesday, May 14, 1980

Deposition of

RICHARD DANZIG

a witness, called for examination by counsel for the plaintiffs, pursuant to notice, taken at The Pentagon, beginning at 10:00 a.m., before Rebekah J. Johnson, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[7] A And the question of whether we would, in fact, take men and women in equal numbers in an emergency situation has been discussed within the Department.

Q What is the view of the Department with respect to that process?

A The view of the process in the event of emergency mobilization associated with, for example, a major war in Europe, the probability is that we would take disproportionate numbers of men—more men that women.

Q To the tune of 570,000 men to 80,000 women in the first six months?

A That is the projection we have generated.

Q And is it the view of the Department that that would reflect the optimal utilization of the available pool?

A Yes. The services—we ask the services—indeed, I ask the services—to indicate we were drafting 650,000 people in the first six months after a major war began, how many women they thought they could use in that—what proportion of that pool they thought could be women. And they responded, and their responses are the basis of the numbers you have just cited. It is not an analysis I have done or my office has done [8] ourselves.

Q But it was an analysis that was done for you by the constituent services?

A That's right.

Q And does the Department consider that selection of the composition of an indiction pool based upon the needs of the services, as articulated by the services, would be impartial in the sense that the Selective Service Act says that induction.

* * * * *

[10] Q Mr. Rostker also indicated in his testimony yesterday, and I believe Andy can corrobarate this, if the relief required by the courts were the immediate registration of women so that you could then proceed on the constitutional basis, that that would also be disruptive, at least at his end, because of the need to come up with the funds to do it and to do an entire new registration program in the middle of mobilization, whereas the theory of registration now, premobilization, was to get what could reasonably to done premobilization. Has that concern been expressed within the Department of Defense as well?

A I see the point, but it is a concern that Rostker would have that is sort of outside of our professional domain. Our concern is he be able to produce people at the rate we have indicated we require them, and so long as he is able to do that, all the additional burdens are his. If he reaches a point where he cannot do that, we become concerned.

* * * * *

[16] A My observation has been consistently that there is no military need to include or exclude any subset of the

population of young people who might be drawn, because the population is considerably larger than the military system itself requires. There are two million, roughly speaking, young men who reach age 18 every year and two million young women. When you expand that pool of four million in each age group to include, say, between the ages of 18 and 35, you get very large numbers of people, and the military couldn't use all those people. In that circumstance, you could exclude people under five foot four, or people with blue eyes, or women and not suffer any adverse military consequences from their exclusion. In sum, I think there is not a military need to include any particular group, period.

Q To include or to exclude?

A Well, there is a military need to exclude in the sense that obviously, for example, handicapped people provide less capacity to do certain kinds of jobs. Similarly, to the extent that there is either a legal or a prohibition on women's role in combat or some physical incapacity that limits the capacity of women to some contraints on the [17] training base that make it hard to train both sexes at once because of privacy or psychological ramifications, there may be provision for excluding women in some parts. To the extent you need, for example, combat positions, it may be there is argument for excluding women from that particular section of your requirement.

Q That's the induction requirement that you are talking about?

A That's right, yes.

Q And that would be essentially the argument against taking men and women randomly in the induction process?

A That's right, and it would also be an argument against perhaps taking any women in the early stages if your early stages were exclusively combat requirements.

Q This is the reason for the plan of the first six months to be all male for the first 60 days and then 20,000 women each month thereafter?

A That's right. Our feeling is in the early days the most critical requirement will be to train combat people.

There is, I might mention, another argument that concerns me in all of this, which is there is a certain utility to having what I would call a fungibility between the people you [18] are taking in. You may think that you need people for support jobs and therefore think that you can take them equally in numbers of men and women. But it may turn out that under conditions of war fighting there is enormous uncertainty and at the last minute you say this group of people we were going to take to be company clerks we are going to take as infantry riflemen. That is the argument for taking men only.?

Q That consideration has been taken into account, has it not, in the analyses by the services arriving at the projections for taking 80,000 out of the first 650,000?

A Yes.

Q So that even giving full consideration to all the reasons for limiting the role of women, it is still the view of the Department that there is no reason to exclude women entirely from registration and thus from the possibility of induction?

A I would only quarrel with the term "no reason." I think there are reasons, but I don't find them convincing.

Q All right, there is no reason that stand up under analysis, so to speak, that would justify the total exclusion of women from the process.

A That's right. I think there are no—I think the [19] reasons advanced do not justify the total exclusion of women from the process.

* * * * *

[25] Q So again, it is a question from the Department of Defense's point of view maximizing all of the available resources into the pool of available resource so that the best use in terms of mission fulfillment might be obtained.

A That's a reasonable statement.

Q There is one other section which happens to appear in the equity section of Mr. Pirie's statement. I was surprised it didn't appear in one of the other, but a question of organization. "It is in the interest of national security that in an emergency requiring the conscription for military service of the nation's youth the best qualified people for a wide variety of tasks in our armed forces be available. The performance of women in our armed forces today strongly supports the conclusion many of the best qualified for military service in the 18 to 26 category will be women. The Administration strongly believes they should be available for the service of the jobs they can do, just as men will be [26] available for jobs they can do." Is that a position of the Department of Defense?

A Yes.

Q And is that a fair summary of what we were talking about before, the performance of the 150,000 today as being the model for showing that some jobs in any military situation are going to be favorably filled by women?

A Yes.

Q A factual point. Senator Cohen was saying to you, "It is my understanding that approximately one out of every seven males who have been drafted have served in noncombat roles. Is that not correct?

"Mr. Danzig. I can check the exact numbers, but the thrust of the point is right.

"Senator Cohen. So six out of seven serve in a noncombat or support mission or perhaps an administrative position in the past?

"Mr. Danzig. Yes, in the present force.

"Senator Cohen. And it would be feasible to assign women to perform the noncombat roles, the administrative roles, the support roles, without involving them in the combat roles.

"Mr. Danzig. Not only feasible, Senator, that is [27] precisely the case at the present."

Is that a correct transcription of the interchange?

A To the best of my recollection.

Q Are your views correctly expressed in that?

A Yes.

Q Historically, because this is one of the reason that we have been unable to get exact figures, is it true that the majority of draftees—using six out of seven, I will temper that to the majority—have wound up in noncombat assignments?

A I really don't know. I would turn to Dean Tice for information about that. What you have gotten from him would be the best I could get.

Q The six out of seven figure is correct just insofar as the figure available, but you don't have a historical sense on it?

A This is why I said to Senator Cohen the thrust of it is right. I've never actually seen that number generated, but the notion that a substantial percentage, probably well over a majority of the percentage of troops, serve in support roles is an accurate one.

Q That is true in peace or war?

A Well, I am simply not sure what happens to those [28] ratios when you expand in war. I think it also would depend on the character of the war.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1480

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

v.

CURTIS TARR, ET AL., DEFENDANTS.

Washington, D.C.
Tuesday, May 13, 1980

Deposition of

MAJOR GENERAL R. DEAN TICE

a witness, called for examination by counsel for the plaintiffs, pursuant to notice, taken at The Pentagon, beginning at 11:50 a.m., before Rebekah J. Johnson, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[12] term I would use those entering the service. During the Battle of the Bulge in 1944, whether you were already in or about to be drafted, everybody immediately went into combat, because it was critical we turn out all combat individuals. We even retrained all the clerks and cooks in France and sent them to the front line. I think you have to make a very definite delineation between the peacetime experiences that we have had with the draft versus war time. But by and large it is based on requirements of the services as specified to the Department of Defense by the Army, Navy, Air Force and Marine Corps.

Q You may not haver understood quite what the question was driving at.

A Please repeat it then.

Q Let me try to reform it.

During your war time experience, have there been times when most of the new inductees, whether they were by conscription or volunteer enlistment, have gone into noncombat, non close combat or non close combat support positions?

A I have no way of recalling when that might occur. Your bulk of your requirements in war time certainly go into combat and combat support skills. You know as a function of [13] expansion, the ratio of the logistical or administrative support certainly doesn't increase at the same rate as combatants do in war time.

Q For example, presently, how many noncombat personnel does it take to keep each combat soldier in the field?

A I don't know if I have that information readily available. There is some problem as to within each of the service's definition of what constitutes combat and combat support. The Army uses three delineations. They use combat, they use combat support, and they use combat service support. And what that does is delineate degrees of distances usually from the front lines. As to the supporting kinds of requirements that you have, within the combat divisions you have certainly combat support units. They are all in the combat divisions, but they are not the maneuver battalions that are involved in the close combat. Yet, I would be hard pressed to, on a fluid battlefield, to perhaps delineate. If somebody is bombing you and the bombs are exploding nearby—you can be 500 miles from the front line—that's pretty close combat as far as life-threatening. It does not involve the face-to-face confrontations with the enemy.

Q Let's use the face-to-face confrontation. Am I

* * * * *

[19] We are also responsible for the armed services examining stations and their operation thereof. And for planning purposes, they were trying to estimate how you would in process both men and women for meeting their

immediate needs. I think that most involved agreed for the first 60 days, they would not call any women.

Q And why was that?

A Mainly because your initial replacements are usually early battle casualties, and it would certainly also simplify the processing for physicals and everything else in the armed forces examining stations.

Q All right, so then—

A Your early call-up, your immediate call-up in case of bringing on the draft would be in anticipation of your early losses in war. And, of course, most of those would be in the combat area. That is a judgmental thing, I think, for [20] policy makers, and rightly so.

Q Let me backtrack just a little. Who was it who was reflecting that view in the discussion that you just referred to?

A I think it's a collective view of all of us who work in the personnel business here.

Q And is this partially a function of the constraint of the way the examining stations are set up now, that it would facilitate having all men, because you don't really have the stations for women at this point?

A No, not really. I don't think that's the paramount reason. The paramount reason on the call-up is what you estimate your immediate needs are.

* * * * *

[22] hypothetical situation that I am aware of.

Q Now the requirements for at least 80,000 additional women over the first six months of a mobilization situation, that does not envision, does it, putting women into roles or positions from which they are presently excluded?

A No, it does not.

Q And so we are talking about expanding the present role of women not qualitatively, but quantiatively during a mobilization, that there would be of the same types of jobs for which they are presently utilized and subject to all the constraints for utilizing women in terms of rotation and

maintaining combat, to strip down and put into combat, we are talking about a minimum of 80,000 additional spots to be filled by women.

[23] A Yes. I think that is as far as we have gone in the current planning.

Q And that would be over that first six months period?

A A hundred eighty days, with no call-ups for the first 60.

Q No call-up of—

A Of women. Of course, you understand that in all of these assessments you assume that we haven't stopped volunteers from coming in.

Q I would think not. That gets to the next question, that during this first 60 days that you would anticipate excluding women from the draft call-ups, would you be taking female volunteers?

A I would assume so.

Q And they would go through the same processing as a draft call-up, wouldn't they, in terms of having to have physicals, unless they have already had induction physicals?

A No, we haven't given thought to that. But I would think the normal processing for volunteers would take place.

Q Volunteers are processed in the same facilities, aren't they, as are conscripts?

A That's true.

* * * * *

[34] Q Okay, I was not hypothesizing a situation where the legal power lies. My question to you was who do you think is most acquainted with the needs of the services and their ability to identify what slots should be or could be filled by [35] men or women?

A I think each of the services have that responsibility as opposed to my office.

Q And they would communicate—

A That requirement to me, yes.

You understand the hierarchy of the DOD policy, with the oversight responsibility over all the armed forces as opposed to identifying the specific needs within each of the services separately.

Q The logical way, as far as you can see it, is for an individual service to identify what mix men and women or what range of mixes is optimal for its—

A Accomplishment of its mission.

Q Right. And they would communicate that to you, as would the other services, and you would say, therefore, we need a total mix of accessions of X percentage or a range, acceptable range, we need this month or the six months between six and 23 percent women, let's say, something like that.

A Something like that, that's correct.

Q And to the extent, getting back to Mr. Pirie's testimony, he says if there were not enough women volunteers, that is, to raise that 80,000 additional women, a separate [36] draft call for women would be issued. To the extent that the authority to register and draft women were denied you, that would inhibit the ability to raise those 80,000 people, 80,000 females, because you would have to get them all through volunteers. Is that correct?

A Yes.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 71-1480
F.S. 76-0193
MISC. NO. 76-0159

ROBERT L. GOLDBERG, ET AL., PLAINTIFFS,

v.

BYRON V. PEPITONE, ET AL., DEFENDANTS.

Alexandria, Virginia
Tuesday, December 21, 1976

Deposition of:

MAJOR GENERAL ROBERT G. GARD, JR.,

a witness, called for examination by counsel for the Plaintiffs, pursuant to notice, at the Hoffman Building, Room 7-N-27, 200 Stovall Street, Alexandria, Virginia 22332, beginning at approximately 11:00 o'clock a.m., before Louis M. Familant, a Court Reporter and Notary Public in and for the State of Virginia, when were present on behalf of the respective parties:

* * * * *

[5] A. I commanded a battery of field artillery during the Korean conflict; a battalion in Germany and a division artillery in Viet Nam. And I was, also, the Commander of Fort Ord (phonetic) in California prior to this assignment.

Q Okay. Which division did you command in Viet Nam?

A The 9th Infantry Division.

Q All right. And the battalion in Germany?

A Was the 5th Battalion (Airborne), 81st Artillery.

Q And what were your duties at Fort Ord?

A I was the Commanding General of the Fort Ord complex consisting of four military installations.

Q All right. And have you had any specialized training or any special experience in the field of [6] personnel planning or administration?

A Well, I have held three jobs related directly to personnel.

I was the G-1 or personnel officer of the 8th Infantry Division following my battalion command in Germany.

I was Director of the Human Resources Development in the office of the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army from 1971 to 1973.

And I currently am serving as the Commander of the U.S. Army Military Center over the last two years.

Q What is the function of the Military Personnel Center?

A Well, our mission is, briefly, the personnel operator for the Army.

We execute military personnel policies, systems and programs, and we develop and supervise military personnel procedures to include the supporting functions that enable us to perform this function.

I also have in my charter the mission of recommending changes to military personnel policy.

* * * * *

[11] Q Okay. Why did you recommend on either of those two occasions that that policy be reconsidered?

MR. ELLIOTT: Objection to that.

MR. WEINBERG: Okay.

THE WITNESS: Well, during my visit to Europe, I had conversation with the Commander of the 32nd Air Defense Brigade.

BY MR. WEINBERG:

Q Who is that?

A Major General Fye (F-y-e). In the Air Defense Missile units, there is an operation center which habitually is located in the combat—in the communications zone and which is well protected.

Prior to the prohibition of women serving in CAT-1 units, General Fye had female soldiers performing tasks in that operation center.

[12] He felt that they were highly effective and could be used there, and that they would be quite well protected from any potential combat situation.

* * * * *

[33] Q In your discussions with General Fye—am I pronouncing it right?

A (Nods head affirmatively).

Q All right. How did he characterize the performance of his female enlisted personnel who had been assigned to CAT-1 units?

A He was most laudatory.

Q And how long has there been a total preclusion enforced in CAT-1 units?

A I am not certain but, I believe, since about 1974.

Q Okay. Prior to that, what is your understanding of the practice?

A There were restrictions as to military occupation specialty, and I can't remember—I am blocking whatever the other one was.

(Pause)

Oh! And those—those positions are considered as interchangeable by the commander in the field.

[34] Q Okay. Now what were those positions considered as interchangeable? How did that come up?

A Well, we initially decided to expand substantially the number of women in the Army. Commanders—

Q Who is "we" at that point?

A I am speaking of "we" as institutionally. When the decision was made to expand substantially the number of women in the Army, commanders were queried as to those positions they felt could be filled either by a male or a female soldier.

So there were some positions reserved for males only.

So, in that sense, there was a restriction. And then, if I recall correctly, a certain M.O.S. was blocked for female participation.

Q Those were primary—excuse me—primarily, combat specialties?

A Yes, the combat specialties.

Q And other than that, the practice was that women could be assigned by a commander to a CAT-1 unit?

A Yes.

Q And do you know of any place other than [35] in the 32nd Air Defense Brigade where women were, in fact, assigned to CAT-1 units?

A Yes. Fort Ord, California.

Q All right. That was while you were commander?

A Yes.

Q And what kind of CAT-1 unit were they assigned?

A Combat Engineer Battalion.

Q And in what capacity?

A Clerical capacity in the battalion headquarters.

Q And those were enlisted personnel?

A They were.

Q And how was their performance?

A I had little opportunity to observe it directly, but it was reported to me that it was very good.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO 71-1480

GOLDBERG

v

PEPITONE

The Pentagon
Washington, D.C.
October 19, 1976

Deposition of

JOHN F. AHEARNE

a witness, called for examination by counsel for the Plaintiff, by agreement of counsel, at the offices of the Department of Defense, Washington, D.C., before Douglas W.G. Blair, a Notary Public in and for the State of Virginia, when were present on behalf of the respective parties:

[34] board, starting with full peacetime operation, clearly there already are limits in those units, in some mix. And so, obviously, the services have already reached the conclusion that they can operate the units.

When shortages exist, the Department's approach has been to tend to understand why the shortage exist and then to take whatever steps are advisable to alleviate the shortage—for example, by increasing recruiting concentrations in areas of high turnover or providing bonuses, enlistment bonuses, and such to increase the number of people to come in.

The approach that the Department will then tend to take is to attract the kind of people that are best for that function and to also try to understand why they are not

attracting them and to, if possible, increase the attractiveness of that area.

In the case of a wartime situation, and your question was addressing shortages in the non-combat areas, at least in part of the time the services would tend to, I believe—and this is now conjecture, particularly conjecture as I am looking into the future and a high-intensity conflict—would probably tend to accept shortfalls in these non-combat areas rather than go to a change in the appropriate mix of [35] people that they have in those areas.

Again, it is more a question that would have to be referred to the military as to how far or how much of a shortfall they would be able to take.

BY MR. WEINBERG:

Q By "mix," you are referring to the male-female mix?

A Any mix—male, female, mental aptitude, physical strength—because once combat has really started, or the likelihood of combat is very great, the concentration would be to make sure that the combat forces are at full strength, and recognizing that other forces can be drawn down somewhat, because the output per individual can be expected to increase or can be more, at least for a short time, to pick up the shortfall.

Q Are you aware of proposed legislation over the last couple of years dealing with the abolition of the Women's Army Corps?

MR. KELSON: Mr. Weinberg, just for clarification, you do not mean the abolition of women in the Army. You are speaking of the technical term, Women's Army Corps?

MR. WEINBERG: Oh, no, just the term, Women's Army

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 71-1480

ROBERT L. GOLDBERG, ET AL.

v.

CURTIS TARR, ET AL.

PLAINTIFFS' REQUEST FOR ADMISSIONS
(SET NO. 2)

Pursuant to Fed.R.Civ.P. 36(a), plaintiffs hereby make the following request for admissions with respect to the subject matter of Defendants' Response to Plaintiffs' Interrogatories (Set No. 5). Pursuant to agreement of counsel, any response to these requests shall be served and filed within seven (7) days of the date hereof, or the matters set forth shall be deemed admitted.

1. With the sole exception of Senate Report No. 226 in 1979 (issued in connection with hearings held in 1979), none of the documents identified in response to Interrogatory No. 28, which requests a statement of all "legislative facts" upon which defendants contend Congress relied or found in support of the exclusion of females from registration for conscription in the Armed Forces, considers or discusses in any way the issue of inclusion or exclusion of females in or from registration or conscription.

2. None of the identified documents recites any legislative facts found by Congress in enacting the Military Selective Service Act, as amended, 50 App. U.S.C. § 451, et seq., and particularly Section 3 of that Act relating to the issue of inclusion or exclusion of females in or from registration or conscription.

3. The question of inclusion or exclusion of females in or from registration or conscription is not explicitly considered in any way in any of the statutory history of Military Selective Service Act, as amended, or of any predecessor conscription statute in the United States.

4. The issue of inclusion or exclusion of females in or from registration or conscription was not considered, analyzed or debated in connection with the passage, amendment or implementation of any conscription statute of the United States.

5. Every conscription statute of the United States since, at least, the Civil War, has provided for registration or conscription of males only.

6. No legislative facts were found or expressly relied upon by Congress in excluding females from registration or conscription in connection with the enactment of the Military Selective Service Act of 1967, as amended.

7. In view of the foregoing, there are no persons known to defendants as having knowledge of any such legislative facts or documents reflecting or referring to the consideration or finding by Congress of such legislative facts.

/s/ _____

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AMMUNITION LOADING AND FIRING TEST— PRETEST PHYSICAL CONDITIONING OF FEMALE SOLDIER PARTICIPANTS

CPT Maria A. Murphy
CPT Theresa M. Nemmers[1]

October 1978

/s/ _____
JOHN D. WEISZ
Director
U.S. Army Human Engineering Laboratory

INTRODUCTION

The influence of women on equipment design is reflected in current Army efforts to accommodate the female soldier in her ever expanding role. Women have been admitted into all military occupational specialties formerly considered "nontraditional" with the exception of the combined arms branches and combat engineers. The growing presence of women in the Army and their projected utilization are gaining increased interest at the congressional level.

The purpose of this report is to present the physical conditioning program which was utilized in conditioning 13 female soldiers in order that they could successfully load and fire the 105mm (M101A1) and the 155mm (M114A1) howitzers. The program was designed by analyzing the specific kinematics utilized in loading and firing the above mentioned howitzers. Anthropometric data is shown in Appendix A. Protocol submitted is exhibited in Appendix B. Universal gymn exercises for strength and endurance are exhibited in Appendix C.

PRELIMINARY CONSIDERATIONS

The training/physical conditioning regimen selected was based on physical requirements for ammunition/

[1] 121st Evacuation Hospital APO San Francisco 96301

portability/handling/loading in FM 6-50(2). Heights, weights, etc., for the howitzers and rounds are shown in Table 1. Table 2 summarizes the actual physical demand for loading crews for each howitzer.

TABLE 1

Physical Parameters of Howitzers Relevant to Conditioning

	Howitzer	
	105mm	155mm
Weight of Round	33 lb. shell, 45 lb. compl.	95 lb. shell
Length of Round	31.07"	26"
Loading Tray	NA	19 lb., 34" long, 16" wide
Raming Staff (aluminum)	NA	10 lb., 2 segments of 4'2" which fit together, 1.5" dia.
Force to Open Breech	10 ft/lbs <	50 ft/lbs
Trail Width	4½"	8¼"
Height of Breech from Ground	43"	46"
Height of Trail at Handover of Round	24"	NA
Height of Handle of Breech from Ground	NA	37"
Distance between Handle of Open Breech and Trail	NA	24"

TABLE 2

Loading Requirements Relevant to Conditioning

	Howitzer	
	105mm	155mm
Distance to carry each round to howitzer	8' - 10'	8' - 10'
Distance to carry powder	NA	3 lb - 6'
Crew size	4	6
Dead weight lift of round from ground to breech	Yes	Yes
Rounds/rate burst fire	10/min for 3 min	4/min for 3 min
Rounds/rate sustained fire (5 min limit)	3/min	1/min
Total training trial rounds/ crew-live fire	4	4
Total training trials/ crew-live fire	5	5
1st test trial exposure time	3 min	3 min
2d test trial exposure time	8 min (burst & sustain)	8 min (burst & sustain)
Total trials	2	2
Number of experimental trials/day/crew	no more than 4	no more than 4
Total number of experimental trials/crew	4	4
Total number of rounds/ crew	75	29
Total training rounds	20	43

It should also be noted that there were no significant injuries incurred during this accelerated program.

CONCLUSION

The physical training regimen for the artillery study has opened the door for further studies on the question of physical training programs of varying nature for the different Army job specialties.

Physical conditioning played a key role in the US Army Human Engineering Laboratory Ammunition Loading and Firing Test. Test directors wanted to see if women who are physically fit could maintain the strength and endurance necessary for the firing sequence. The rate of fire is 4 rounds-per-minute for the first 3 minutes, then 1 round-per-minute thereafter for the 155mm M114A1 towed howitzer; and 10 rounds-per-minute for the first 3 minutes, then 3 rounds-per-minute sustained for the 105mm M101A1 towed howitzer. The subjects not only met the rate of fire on both howitzers, but in several instances exceeded it.

IMPROVING CAPABILITY TO MOBILIZE MILITARY MANPOWER:

A REPORT BY THE
DIRECTOR OF THE SELECTIVE SERVICE
A DRAFT WORKING DOCUMENT
16 January 1980

• *Schedule for training Federal personnel in registration.* Each Memorandum of Understanding with a supporting Federal agency provides that personnel will be trained on appropriate aspects of Selective Service procedures. Selective Service, USPS, IRS and SSA will review registration forms to insure that they are compatible with normal operating procedures.

• *Likelihood that induction notices would survive potential court challenges.* The Selective Service General Counsel has reviewed all post-mobilization plans and procedures. Sections 5(a)(1) and 10(b) of the MSSA imply that local draft boards shall issue induction orders. At the same time, Section 5(d) of the Act authorizes a uniform national draft without regard to local boards whenever the President prescribes the use of the lottery. The section places the issuance of induction orders under such rules and regulations as prescribed by the President. Selective Service plans, through the EMMPS procedures, to issue induction orders under authority of this section and is developing updated regulations. To insure that the authority to issue induction orders is completely unambiguous, Selective Service recommends a statute change which will specifically grant the President authority to issue induction orders under Sections 5(a)(1); 10(b); and 5(j) of the MSSA.

The General Counsel has advised that the registration and induction system may be vulnerable to legal challenges if a claims structure was not in place at the time of induction. Accordingly, we are planning to undertake the selection and training of local board members in fiscal year 1981.

The General Counsel has also advised that to meet current Constitutional law requirements of equal protection, any system of registration for and induction into the armed forces must include both men and women. Accordingly, the Selective Service is recommending an amendment to the MSSA to provide for the registration and induction of men and women.

At this time we know of no other legal questions pertaining to a post-mobilization registration plan.

• *Registration and Induction of Women.* The Selective Service and the Department of Defense agree that any future draft should be applicable to both men and women, because (1) it would be inequitable to restrict registration and induction to men since women can and currently do fill substantial, essential military requirements; and (2) the evolution of substantial relationship standards of equal protection in gender renders an all male draft constitutionally suspect.

The Department of Defense has also advised that under the present state of the law, they assume the validity of current gender based combat restrictions, whether accomplished by statute or policy. In recognition of present combat restrictions, DOD has proposed, and Selective Service supports, a change to the MSSA to provide standby Presidential authority to register and classify both men and women, to randomly induct men only in sufficient numbers to fill combat positions and to maintain a replacement pool for those positions, and to randomly induct men and women on an equal basis to fill non-combat positions. We have been advised that given the above, Defense would not require women within the first 60 days, i.e., they would not be part of the 100,000/M+60 requirement, and that 80,000 women woud be required over the period M+90 to M+180. These women would be part of the total 650,000 six-month requirement.

SUMMARY AND CONCLUSION.

The Selective Service, over the last several months, has completely revised the plans by which it will register and

induct draft eligible people into the Armed Services. We believe that we *now* have a capability to respond in an emergency. The changes which have provided this new capability are:

- An agreement with the United States Postal Service to conduct registration at their 34,000 postal offices throughout the United States, and with the Department of State to conduct registration overseas.
- An agreement with the Internal Revenue Service and the Social Security Administration to keypunch completed registration forms.
- A procedure to expedite the induction process by sorting and processing completed registration forms in Random Sequence—Lottery number order.
- The development of a simplified procedure to issue induction orders, claims information and forms.
- Agreements with the Department of Defense to:

—Support the Emergency Military Manpower Procurement System (EMMPS) on an Army computer until we can build a joint SSS/MEPCOM computer center, which will be completely dedicated to military manpower procurement and processing, peace and war.

—Provide to Selective Service, 434 Armed Forces Recruiting Stations and 1,500 personnel to facilitate the reestablishment of area offices.

While an immediate reactivation of the system, incorporating these changes, would be difficult and could not be accomplished in the minimum times suggested in this report, the actions already taken should enable us to meet the minimum needs of the Department of Defense. Selective Service is committed over the months ahead, working with supporting Federal agencies, to refine our plans, develop operating procedures, train personnel and test our ability to meet the emergency military manpower requirements of the Department of Defense.

No. 407. Enlisted Military Personnel, by Occupation Group: 1945 to 1967

[In thousands, except percent. For years ending June 30]

Occupation group	Number					Percent distribution				
	1945	1953	1960	1963	1967	1945	1953	1960	1963	1967
Total	8,396	2,396	1,522	2,030	2,373	100.0	100.0	100.0	100.0	100.0
Ground combat	2,071	391	245	286	335	24.1	17.3	13.4	14.1	14.1
Infantry	974	209	122	157	186	11.3	9.2	7.2	7.7	7.8
Artillery	732	106	60	65	71	8.7	4.7	3.3	3.2	3.0
Armor	113	40	28	32	36	1.3	1.8	1.5	1.6	1.5
Combat engineers	229	34	25	31	40	2.7	1.5	1.4	1.5	1.7
Other	3	1	1	1	2	(Z)	(Z)	(Z)	0.1	0.1
Electronics	800	216	245	292	349	5.8	9.5	13.4	14.4	14.7
Maintenance	164	105	133	168	192	1.9	4.6	7.2	8.3	8.1
Operation	336	111	113	124	156	3.9	4.9	6.2	6.1	6.6
Other technical	618	166	147	162	182	7.3	7.3	8.0	8.0	7.7
Medical and dental	400	101	85	94	108	4.7	4.5	4.6	4.6	4.6
All other, incl. musicians	218	65	62	68	74	2.5	2.9	3.4	3.4	3.1
Administrative and clerical	1,313	467	377	462	438	15.3	20.6	20.6	19.8	18.4
Supply	392	137	124	131	141	4.6	6.3	6.8	6.5	5.9
All other	921	330	253	271	297	10.7	12.4	13.8	13.3	12.5
Mechanics and repairmen	1,717	506	453	498	619	20.0	22.3	24.8	24.5	26.1
Aircraft	467	172	194	199	236	5.7	7.6	10.6	9.8	9.9
Automotive	335	82	80	71	106	3.9	3.6	3.2	3.5	4.5
Munitions and weapons [1]	224	51	46	49	68	2.6	2.3	2.5	2.4	2.9
Shipboard machinery	250	97	79	88	98	3.0	4.3	4.3	4.3	4.1
Electrical and wire communications	239	93	72	87	106	2.8	4.1	4.0	4.3	4.5
Other	74	12	4	4	5	0.9	0.5	0.2	0.2	0.2
Craftsmen	791	150	129	146	162	9.2	6.6	7.6	7.2	6.8
Construction and utilities	330	51	50	61	62	3.9	2.3	3.2	3.0	2.6
Shipboard operations	207	36	25	27	34	2.4	1.6	1.3	1.3	1.4
Metal working	127	24	20	20	23	1.5	1.1	1.1	1.0	1.0
Other	118	39	34	38	43	1.4	1.7	2.0	1.9	1.8
Services	1,428	348	225	241	285	16.6	15.4	12.3	11.9	12.0
Motor transport operators	400	87	58	57	68	4.8	3.8	3.1	2.8	2.9
Food service	440	143	81	86	98	5.1	6.4	4.4	4.3	4.1
Security	221	79	66	71	75	2.6	3.5	3.6	3.5	3.1
Other	366	38	22	27	43	3.5	1.6	1.2	1.3	1.9
Miscellaneous [2]	160	22	-	-	-	1.9	1.0	-	-	-

- Represents zero. Z Less than 0.05 percent. [1] Includes naval gunners. [2] Includes aerial gunners.

Source: 1945–1960, Harold Wool, *The Military Specialist, Skilled Manpower for the Armed Forces*, Johns Hopkins Press, Baltimore, Md., 1968 (copyright); thereafter, Dept. of Defense, Office of the Secretary, unpublished data.

In the Supreme Court of the United States

No. 80-251

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT,

v.

ROBERT L. GOLDBERG, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 1, 1980

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No. 80-251

IN THE

Supreme Court of the United States

October Term, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM JUDGMENT

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I. MOTION TO AFFIRM AND STATEMENT OF THE ISSUES RAISED THEREBY

A. Motion to Affirm

Appellees, plaintiffs below, respectfully move pursuant to Rule 16.1(d) of the Rules of this Court for affirmance of the judgment below which declared unconstitutional, and enjoined enforcement of the registration provisions of, the Military Selective Service Act ("the MSSA"), 50 U. S. C. App. §§ 451 *et seq.* This motion is filed at the request of the Court, as set forth in the letter of the Clerk dated October 7, 1980. Appellees respectfully suggest that, should this motion be granted, the mandate of this Court be stayed for thirty days to enable Congress to enact such new legislation as it deems appropriate in the area.

B. Statement of the Issue on Appeal

The District Court decided a narrowly defined and carefully stated issue:

> "The issue before us is whether exclusion of women is substantially related to an important governmental function. This issue does not involve the court in determining how the military should utilize women in any given situation. The issue before us is the constitutionality of the total exclusion of women from the MSSA, not the extent to which the military services must utilize women." (Jurisdictional Statement at page 20a ("Jur. St., 20a")).

Similarly at issue in this appeal is whether registration for possible military conscription may be gender-biased and still satisfy the Due Process Clause of the Fifth Amendment, and thus whether the present male-only registration provisions of the MSSA are unconstitutional. Scrutinizing those provisions under the test established by this Court for review of gender-based classifications, a

statutory three-judge panel sitting as the United States District Court for the Eastern District of Pennsylvania ruled in a unanimous Memorandum Opinion [1] and Order [2] of July 18, 1980, that the MSSA violated the Due Process Clause of the Constitution and enjoined defendants "from requiring the registration under the [MSSA] of any member of the plaintiff class." (Jur. St., 44a). Based upon a close and careful analysis of a record at trial which consisted of more than 2,000 pages of documents and testimony, compiled over the course of nine years of investigation and discovery, the District Court held that:

> the complete exclusion of women *from the pool of registrants* does not serve "important governmental objectives" and is not "substantially related" . . . to any alleged governmental interest. Thus, the MSSA unconstitutionally discriminates between males and females. (emph. supplied). (Jur. St., 43a).

Appellees urge this Court to affirm summarily the judgment of the District Court because, when viewed in the context of the full record which was before the trial court and is now in this Court, the grounds advanced for reversal in the Jurisdictional Statement are so manifestly without merit as to require no plenary review.[3] The legal standard applied by the District Court was

1. Jur. St., Appendix A.

2. Jur. St., Appendix B.

3. The question presented by the appeal is whether "the exclusion of females from the registration provisions of the [MSSA] invidiously discriminates against males in violation of the Due Process Clause." (Jur. St., I). The two grounds urged for reversal are that the District Court erred in (1) examining the gender discrimination in the registration requirement of the MSSA under the standard of *Craig v. Boren*, 429 U. S. 190 (1976); and (2) finding the MSSA unconstitutional when examined under *Craig*. (Jur. St., 7, 12). Additionally, the only appeal taken was from the order of

clearly mandated by prior decisions of this Court; and the factual findings of the District Court are both dispositive of Appellant's contentions and amply supported in the Record.

In its ruling, the Court below emphasized that the focus of this case is on the registration provisions of the MSSA.[4] The District Court assumed no broadening of the roles available to women in the military. (Jur. St., 21a-22a). Nor did it consider any fixed ration of male to female conscripts; it left that question to be determined by the needs of the military at the time of, and in the circumstances which require, renewal of conscription. *Id.*

> "To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces. We need not decide if women must serve in all roles in the military including combat." (Jur. St., 21a-22a).

See also, Jur. St., 32a-36a.

Thus the only issue in this case is the validity of the *total exclusion* of *all females* from *registration* as potential draftees into any military position. Appellees urge this Court to affirm as manifestly correct (1) the applicability of heightened scrutiny to sex-discrimination in registration for the pool of potential draftees, and (2) the conclusion that the MSSA is unconstitutional under that standard.

---

3. (Cont'd.)

July 18, 1980. The Government took no appeal from the final judgment entered on July 30, 1980, which became unappealable no later than September 28, 1980. *Cf. Reed v. Allen,* 286 U. S. 191, 200-01 (1932). *Compare, United States v. Indrelunas,* 411 U. S. 216, 220-22 (1973); *Bankers Trust Company v. Mallis,* 435 U. S. 381 (1978).

4. 50 U. S. C. App. § 453.

II. STATEMENT OF THE CASE AND ANALYSIS OF THE RECORD

A. The MSSA

The MSSA was enacted in its modern form in 1948,[5] and has been updated periodically.. The basic structure of the MSSA, particularly the relationship of registration to all other and subsequent provisions, has remained intact since 1948. The import of the sections of the MSSA most pertinent to the issues raised in this appeal is as follows:[6]

The MSSA is intended to achieve an adequate armed strength by a system of selection which is fair and just, and in which the obligations and privileges of service are shared generally. (MSSA, Sec. 1(a)-(c)). The MSSA calls for the registration of males only. (MSSA, Sec. 3). Liability for conscription or induction into military training and service is limited to registrants, *i.e.*, to males. (MMSA, Sec. 4(a)). Before any conscript may be sent abroad, he must be given at least twelve weeks military training. (MSSA, Sec. 4(a)). Selection for induction is made from present registrants who are liable for training and service and are not exempt or deferred. (MSSA, Sec. 5(a)(1)). Failure to perform any duty imposed by the MSSA or regulations promulgated thereunder is a felony, punishable by imprisonment and fine. (MSSA, Secs. 12, 15(b)).

B. The MSSA, Women, and Congress in 1948

The uncontested fact is that when Congress enacted the MSSA in June 1948, it gave *no explicit consideration* whatever to whether male-only registration for conscription was necessary or even sound. The Government has admitted in this case that "the question of inclusion or exclusion of females in or from registration or conscription is not explicitly considered in any way in any of the statu-

5. 62 Stat. 604.

6. The MSSA appears in full text at pages 77 through 127 of the Revised Joint Documentary and Stipulated Record (R77-127).

tory history of the Military Selective Service Act, as amended, or of any predecessor conscription statute in the United States."[7] (R1714).

Contrasting with the lack of justification in the history of the MSSA, the District Court observed that at the time "an aura of male chauvinism permeated Congressional attitudes toward women in the military." (Jur. St., 23a, n. 15). Appearing before the House Subcommittee on Military Personnel on March 5, 1980, Deputy Assistant Attorney General Lawrence Sims characterized the Congressional attitude in 1948:

> "The reason for [not relying upon the legislative history or the reasoning of Congress to defend the all-male registration provisions of the MSSA] is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress." (R1044; Jur. St., 23a, n. 15).

Mr. Sims' reference to the stereotypes which controlled Congressional perception of women in the military in 1948 is equally supported by the debates over the Women's Armed Services Integration Act ("WASIA"), 5 U. S. C. § 627, which was considered by the same committees and by the same Congress at the same time as the MSSA.[8] The stereotypes cited to the District Court included assertions that men would not "take orders from" female officers and that women would "get married" long before they would qualify for military pensions. (Jur. St., 23a, n. 15).

7. Plaintiffs' Requests For Admissions (Set No. 2). (R1712-1714). Those Admissions followed Defendants' Response to Interrogatory No. 28 (R60-61), which requested a statement of all legislative facts found or relied upon by Congress in support of all-male registration. (R60-61).

8. The WASIA brought the Women's Army Corps and other female forces from Reserve to Active status.

See also, Congressional Record-House, June 2, 1948, p. 6967; April 21, 1948, p. 4694.

C. Enacted Amendments to the MSSA

A lack of Congressional findings relating to the registration of women has characterized all enacted revisions or amendments to the MSSA. (R1713-14; ¶¶ 2, 4, 6).

D. Facts Relevant to the Grounds for this Appeal

1. Factual Contentions Urged by Appellant

Appellant's principal source for "facts" relied upon to support male-only registration is S. Rep. 96-826, April 22, 1980, the report of the five-man majority of the Senate Subcommittee on Manpower and Personnel. (R874-886). Appellant contends that any eventual conscription would inevitably be for combat positions foreclosed to women; that there are enough female volunteers to fill non-combat positions open to women; and that merely having women registered and *available* for the draft would somehow reduce military flexibility and lead to unacceptable administrative problems (Jur. St., 12-15). S. Rep. 96-826 itself can be traced directly to the request by the Department of Justice for *post hoc* statutory history for use *in this case.* In March 1980, Deputy Assistant Attorney General Lawrence Sims appeared before both the House Subcommittee on Military Personnel and the Senate Subcommittee on Manpower and Personnel. In those appearances, he candidly described the constitutionally impermissible stereotyping reflected in the statutory history of the MSSA,[9] and explained to both subcommittees that the three-judge court in Philadelphia was going to rule on the constitutionality of male-only registration:

Mr. Sims. "Before doing so, I would like to note that that is a matter that is currently in litigation

9. Quoted at p. 5, above.

before a three judge Federal Court in Philadelphia, the specific issue of the constitutionality of an all male draft." (R1042).[10]

Mr. Sims was appearing in connection with the President's proposal to amend the MSSA to authorize the registration of women. In the alternative, Mr. Sims formally requested the creation of new "history," for imputation to the full Congress now and in 1948, to replace the lack of reasoned consideration which the Government has admitted characterized the exclusion of women from registration under the MSSA since 1948.[11] The record of this case contains what may be the most explicit agreement ever to create evidence for use in a federal court:

> Mr. Sims. "[E]ver since this three-judge court case was filed in 1970, the evolution of the Supreme Court's interpretation of the equal protection clause as applied to sex discrimination has been sort of extraordinary—would be a good word for it. It has come a long way, and the Justice Department, although we will make every conceivable effort to defend the constitutionality of the existing law, as I stated earlier, *we can use all of the help we can get,* and let me reemphasize the fact that the courts have shown a great deal of deference to Congress takes no responsibility whatsoever off of your shoulders and the administration's shoulders *now to address these issues very squarely* and resolve them as they should be resolved.

---

10 *See also,* R963, 1042-45.

11. "The issue is now back before Congress, and *speaking solely for the Department of Justice as litigator,* it should be fairly obvious to this committee that the defensibility of the all male draft is something which *Congress perhaps should speak out clearly and formulate the kind of record* if, indeed, it chooses to reject the Administration's proposal, *which will be helpful rather than hurtful in the litigation.*" (emphasis supplied) (R1045)

> Mr. White. "I think we have made a pretty good record for you, and if you are looking for back-up information or evidence, I think it is there throughout this hearing. Don't you feel so, Mrs. Holt?
>
> Mrs. Holt. "Yes." (R1069) (emph. supplied) [12]

2. The Facts Found By the District Court

The District Court carefully reviewed each of Appellant's factual contentions at trial, tested them against the record made both before Congress and in this case, and rejected each. (Jur. St., 24a-43a).

The primary justification for male-only registration advanced by Appellant is that registration of both women and men would "den[y] the military the flexibility it obtains through an all-male draft and conscription." (Jur. St., 15).

The District Court, however, found that "it is the antithesis of 'flexibility' to exclude women from the pool of registrants." (Jur. St., 43a). The support for those findings is overwhelming, and is largely the undisputed testimony of the Government itself.

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12. When asked by the House subcommittee whether a deferential standard applies to sex-discrimination cases in the military, Mr. Sims replied:

> "Let me also say this sharp distinction [between the military and civilian contexts] you are talking about is not quite as sharp as I wish it would be from the standpoint of somebody trying to defend the Selective Service Act of 1949 (sic). Indeed, the language that we rely on most heavily in our opinion, Mr. White, from *Schlesinger vs. Ballard* is clearly different in that case, and it *says in an opinion issued by the Supreme Court that not one of them has suggested that it ought to be a decision based upon defering* (sic) *to military needs.*
>
> "So, while we are prepared to make that argument, I am not nearly as confident and I don't think the sharp distinction you are talking about has been drawn in *any* court cases of which I am aware." (emph. supplied) (R1070-71).

Now the Government is telling this Court that *Schlesinger v. Ballard* did defer to military needs in adopting a "rational relationship" test for military sex discrimination. (Jur. St., 6, 7-8).

Appellant contends, based upon S. Rep. 96-826, that there would be no need for female conscripts in a mobilization, because the need would be for combat troops; women would not be combat troops; and enough women would volunteer for non-combat roles to meet the needs which can be filled by women.

The record before Congress and in this case refutes Appellant's contention. There may be a shortage of personnel in combat positions in time of war, even as there is in peacetime.[13] However, due to the number of support troops (who can be women) necessary for each combat soldier,[14] one immediate problem in a mobilization is "a deficiency in the ratio of support forces in the Army to combat forces."[15] Where the need to raise large numbers

13. The quotation from S. Rep. 96-826 relied upon at Jur. St., 13 to establish the need for draftees in combat positions is explicitly limited to *peacetime conditions.*

14. Jur. St., 32a, n. 23. Even in the basic Army infantry division nearly two-thirds of the troops serve in a support capacity. *Report by the Special Subcommittee on the Utilization of Manpower in the Military of the House, Committee of Armed Services,* 92nd Congress, 2d Sess. 14658 (1972). During the Vietnam War, only 14.1% of the troops were in ground combat occupation groups. *Statistical Abstract of the United States (1971),* p. 255. (R1808).

15. General Rogers testified:

> "Mr. Chairman, we found, in fact, a shortfall in the number of combat service support units necessary to support the combat forces under the contingency conditions which were played in Nifty Nugget, the mobilization of 1978. Such a shortfall means, as far as the Army is concerned, dependence upon host nation support and dependence upon Reserve Component units which contain 67 percent of our Army support forces."

Testimony of Army Chief of Staff, General Bernard W. Rogers, to the Senate Subcommittee on Manpower and Personnel, March 13, 1979 (R1213-14).

Accord, testimony of the other Chiefs of Staff. (R1214-15).

In his March 5, 1980 testimony to the House Subcommittee on Military Personnel, Assistant Secretary of Defense Pirie made the same point:

of non-combat troops is even a possibility, the *exclusion* even from consideration of a large number of those people best qualified for such roles is unjustifiable.

Appellant's reliance upon the subcommittee majority's conclusion that "military needs that can presently be satisfied by women are already met by women volunteers, whose numbers have been steadily increasing"[16] is similarly without import for this case. The ability to meet peacetime quotas with volunteers is irrelevant to the ability to meet wartime needs with volunteers.[17] Again, exclusion of a pool of persons who could be conscripted *if needed* is certainly not supported by either adequate or inadequate numbers of volunteers.

Nor does wartime recruitment experience support the subcommittee's sanguine view. The District Court noted:

> "With the advent of the Korean War an unsuccessful effort was made to recruit some 100,000 women to meet rapidly expanding personnel requirements. Dept. of Defense, Background Study—Use of Women in the Military at 3 (2d Ed. 1978). It is very possible that the utilization projection for women may not be filled solely through volunteers, just as the nation's total needs may not be filled by volunteers. That is the

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15. (Cont'd.)

> Mr. Pirie. "Not only will we need to expand combat arms, as I say, that is the pressing need, but we also have to expand the support establishment at the same time because that meets the situation where the combat arms can carry out their function successfully, and the support establishment now uses women very effectively, and in wartime I think the same would be true."

(Jur. St., 40a, n. 30).

16. Jur. St., 13.

17. Actually, while the Army is now increasing its peacetime recruitment goals for women, it is having difficulty in meeting those goals. As General Rogers testified, the Army was experiencing a twenty-five percent shortfall in female recruitment in fiscal year 1979. (Jur. St., 39a, n. 29; R1220).

reason for a selective service system. (Jur. St., 31a, n. 22).

Refutation of the Government's newly-found argument that flexibility of personnel management dictates male-only registration began even before the MSSA was enacted. As General of the Army Dwight D. Eisenhower testified in the hearings on WASIA:

> "Like most old soldiers I was violently against women soldiers. I thought a tremendous number of difficulties would occur, not only of an administrative nature . . . but others of a more personal type that would get us into trouble. None of that occurred . . . in the disciplinary field they were . . . a model for the Army. More than this their influence throughout the entire command was good. *I am convinced that in another war they have got to be drafted just like men.*" Hearings on S1614 Before The Subcommittee on Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess. No. 238 at 5563-64 (1948) (emph. supplied).[18]

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18. The position of our military leaders over the years has been notably consistent on this point since the War Department first recommended registration of women in 1942. *Beans,* Sex-Discrimination in the Military, 67 Military L. Rev. 19 (1975). On October 25, 1977 then Chairman of the Joint Chiefs of Staff, General Bernard W. Rogers, stated that serious consideration had to be given to drafting women in view of "the great job that they are doing." (R541). On the simpler issue of *registering* women for the draft, General Rogers was emphatic. When asked whether women should be included in any future registration, he replied:

> "[W]omen should be required to register for the reason that General Wilson mentioned, which is in order for us to have an inventory of what the available strength is within the military qualified pool in this country. That is my opinion."

The District Court noted and relied upon General Rogers' testimony. (Jur. St., 39a, n. 30).

The District Court found that a special skills draft could be used to maximize the *positive* impact on military flexibility which would come of registering women. (Jur. St., 37a, n. 27). Support for that proposition was firm even before the MSSA. In 1945, President Roosevelt submitted to Congress the Nurses Selective Service Act of 1945, proposing the *induction* of twenty-thousand (20,000) female nurses. Nurses Selective Service Act of 1945, H. Rep. 194, 79th Cong., 1st Sess. (1945). That Act *passed* the entire House of Representatives; and only the end of the war in Europe, with its resulting lessening of the need for nurses, prevented the enactment of America's first female draft. Nurses For The Armed Forces, S. Rep. 130, 79th Cong., 1st Sess. (1945).

In 1951, Congress had recognized the need for more women in the Armed Forces in time of war than in time of peace.[19] In 1980, Assistant Secretary of Defense Robert B. Pirie testified at deposition that the number of women in the Armed Forces would have to increase in time of war, even beyond the 250,000 women goal for the peacetime forces. (Jur. St. 31a-33a, n. 25). There is no reason to believe, and neither Congress nor any of its committees ever found, that optimal utilization of women in time of war could be achieved without being able to draft women. The District Court's finding that the authority to register women, and thus the ability to induct them, enhances military flexibility and effectiveness is thus uncontested on the record.

A further problem with the Government's reliance upon S. Rep. 96-826 is that the answer requested by Mr. Sims is to the wrong question. As often as Mr. Sims and

19. "No compulsory military service for women is contemplated. However, the services indicated that more women could be used to replace men if the present ceiling of 2 percent on women in the Armed Forces were lifted. The Air Force indicated they could use up to 10 percent women; the Navy and Marines could use 7 percent women 'in time of war'." S. Rep. 117, 82nd Cong., 1st Sess., 7 (1951) (R1732).

others told the subcommittee that "the question of military necessity for drafting women is irrelevant to the Constitutional issue,"[20] the subcommittee majority still wrote that:

> "There is no military need to include women in a selective service system." (R880).

Whether or not that is true, to sustain the statute it is not enough to show that "their inclusion was [not] needed; it would have to be shown that their exclusion was needed." (Jur. St., 21a). There is simply *no* evidence that the *exclusion* of women from registration meets any military need.[21]

The District Court found, simply, that the military does not lose flexibility if women are registered. (Jur. St., 42a). Again, the finding is supported by testimony directly on point. The theoretical constraints which limit the percentage of women who could serve in units open to women, and thus limit the number of women who would be drafted in the most extreme war scenarios (expressed in terms of "flexibility" and "rotation" by Appellant (Jur. St., 28a-43a)), were all taken into account by the Department of Defense and by the Armed Forces themselves in generating plans which call for the conscription of 80,000 women as most consistent with the objective of raising the most effective force. (Jur. St., 42a, n. 31). Indeed, since 1948 Congress has itself been a prime mover in expanding

20. R920-21. See also the testimony of Appellant Rostker (R903); testimony of Principal Deputy Assistant Secretary of Defense Danzig (R921-22); and the dissenting views of Senator Cohen. (R886).

21. Yet that is what the Government must prove in this lawsuit. (R20a-22a). The Government is evidently aware that S. Rep. 96-826 spoke to the wrong question, because it knew that the *right* question was whether

> "there is a military necessity not to register [women] . . .
> That is the burden we will carry . . .

Testimony of Mr. Sims to House Subcommittee on March 5, 1980. (R1046).

the role of women in the military, and the military's dependence upon women.

In the mid 1970's, over the objections of the Services which wanted to reserve all service academy positions for officers who could lead combat troops, Congress opened the service academies to women. *E.g.*, 90 Stat. 2708, 14 U. S. C. § 182(a):

> "All such appointments shall be made without regard to the sex, race, color, or religious beliefs of an applicant."

In 1978, Congress abolished the Women's Army Corps as a separate entity within the Regular Army,[22] thus completing the integration of the Regular Army begun in 1948. In so doing, Congress repealed the combat exclusion for women in the Army, thus leaving to the Army itself the matter of deployment of women in the Army.[23] Even in the Navy and Air Force, where combat exclusions still exist, Congress now permits the Secretary of the Service to designate any member of the service to perform any function requiring "special training or experience," a designation exempt from the combat exclusion. *E.g.*, 10 U. S. C. § 8067(i). Moreover, Congress has consistently voted the funds necessary to recruit and train ever more women for their increasingly prominent role in the military. (Jur. St., 39a).

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22. 92 Stat. 1627, repealing 10 U. S. C. § 3071.

23. Assignment restrictions tending to keep women out of combat still exist for other services. E.g., 10 U. S. C. § 6015 (Navy); 10 U. S. C. § 8549 (Air Force). The Air Force exclusion pertains to crews of combat aircraft, who must be officers, and is therefore not relevant to restrictions on enlisted personnel. The services have requested Congress to repeal those limitations. *Statement by Robert Pirie*, 13 Nov. 1979 (R1078-1086). Even those existing exclusions are not complete. For example, female Air Force doctors, lawyers, chaplains, dentists, veterinarians, nurses and medical specialists are exempt from the combat exclusion under 10 U. S. C. § 8067. Congress itself modified 10 U. S. C. § 6015 after it was held unconstitutional in *Owens v. Brown*, 455 F. Supp. 291 (D. D. C. 1978).

History thus supports the statement that Congress has never itself made a considered judgment that women in the services are in any way inconsistent with military flexibility. Indeed, with the "incongruous" exception of registration for conscription, the legislative trend has been to concur with or even to go beyond the judgment of the professional military and civilian defense establishment in utilizing females as well as males in meeting military needs.[24] Utilization of males and females in ways consistent with professional military judgment is precisely the result which Appellees sought and the District Court decreed in this case.

E. The 1980 Presidential Proposal to Register Women

Congressional failure to amend the MSSA in 1980 is irrelevant to any justification for the 1948 statute. However, the record made in the 1980 hearings contains many facts demonstrating the *positive* correlation between gender-blind registration and military flexibility, as found by the District Court. *See* Section IV(D), *infra.*

The President, whose Proclamation No. 4771 (July 2, 1980) caused the registration of nearly four million young men in the two weeks following July 21, 1980, initially proposed amending the MSSA to provide authority for female registration in his *Presidential Recommendation For Selective Service Reform: A Report To Congress Pursuant to P. L. 96-107* (Feb. 11, 1980).[25] The President "decided to seek authority to register, classify and examine women for service in the Armed Forces" because of their successful service today and after full consideration of present combat exclusion policies and of the fact that a "substantial number of support jobs must be reserved for men so that they will be available if needed as close combat replacements."[26]

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24. Jur. St., 37a, 38a.

25. "Presidential Recommendations." (R196).

26. R201.

Just as plaintiffs urged and the District Court found,[27] the President concluded:

> "Equity can be achieved by registering both men and women and then providing that they serve in proportion to the ability of the Armed Forces to use them effectively. Conscriptions would be based upon actual military personnel needs at the time." (R201).

The President found male-only registration and induction "inequitable" in view of the exemplary performance of women in their expanded role in today's military. Presidential Recommendations, 26-27 (R223-24).

On March 5 and 19, 1980, hearings on the President's proposal to amend the MSSA were held before the Subcommittee on Military Personnel of the Committee on Armed Services of the House of Representatives and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. Representatives of the Department of Defense, Office of Management and Budget, and the Director of Selective Service testified in support of the proposal.

The Director of Selective Service, Appellant here, urged the subcommittees to support the registration of women:

> The fundamental task of the Selective Service System is to determine in a fair and consistent way who will go . . . . I think it behooves us then to have as a large a base as possible commensurate with the jobs that the Defense Department requires to be done, and the skills and abilities of the people who are available to do those jobs.

Stenographic Transcript of Hearings before the Committee on Armed Services Subcommittee on Military Personnel, House of Representatives, March 5, 1980, at 23. (R1049).

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27. Plaintiffs' Proposed Findings of Fact, No. 45; Jur. St., 42a-43a.

Assistant Secretary of Defense, Robert Pirie, expressing the official Defense Department position, testified that it is in the interest of national security that in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. He advised that "the performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women . . . . [Those women] should be available for service in the jobs they can do, just as men will be available for jobs they can do." (R1033).

He also explained that there are currently 150,000 women on active duty in the Armed Forces. By 1985, the services project that there will be 250,000. In the event of a mobilization, the Department of Defense would require approximately 650,000 inductees and it would be advantageous to the military if 80,000 of these were women. (Jur. St., 31a).[28]

Principal Deputy Assistant Secretary of Defense Danzig stated the Department of Defense position at his deposition: even taking into account that many people drafted for support positions might be redeployed to combat roles, military effectiveness is best served by drafting at least 80,000 women. He emphasized that there is no valid reason for "the total exclusion of women" from registration. (R1615-16). *See also* Jur. St., 39a-40a, n. 30. So much for Appellant's conclusory hypothesis of a negative impact of registering women upon military flexibility.

The final argument advanced in the Jurisdictional Statement, that of "monumental strains on the training

28. The testimony of Assistant Secretary Pirie and other senior civilian and military officials is further described at Section IV(D), *infra*, and by the District Court at Jur. St., 37a. There is even ample evidence in the record that concentrations of females in combat support units far in excess of what is actually contemplated by the Army would not decrease unit performance, even under extended field conditions. *America's Volunteers*, 76-7 (R299-299A).

system," is directly refuted by S. Rep. 96-826 itself, because the finding was said to be valid only,

> "[i]f the law required women to be drafted in equal numbers with men . . . ." (R881).

Neither the Pentagon, the Service Chiefs, the plaintiffs below, nor the District Court, argued that such inflexible induction allocation was necessary. As Appellant Rostker himself testified on deposition, there are *no administrative obstacles* to a both-sex registration or draft, supplying whatever proportion of women the military might request. (R1369-70) [29]

The record proves in overwhelming detail that the District Court was entirely correct when it found it "incongruous" to "expand the utilization of women in the military" while not considering them for inclusion in conscription. (Jur. St., 38a). The inconsistency can only be explained by reference to paternalistic sex-stereotyping, elevated above even the optimization of military effectiveness.

It is thus on fragmentary, after-the-fact conclusions of a handful of Congressmen and Senators, conflicting even with the evidence before them and before the District Court, that Appellant seeks to defend male-only registration.

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29. The Military Personnel Subcommittee of the House Armed Services Committee, by a vote of 8 to 1, tabled the recommended amendment to the MSSA which would have imposed the registration requirement on women as well as men; and the Manpower and Personnel Subcommittee of the Senate Armed Services Committee rejected the Administration's proposed amendment, by a vote of 5 to 2, and issued S. Rep. 96-826. On June 26, 1980, Congress appropriated $13,285,000 to reinstitute draft registration. H. R. Res. 521. On July 2, 1980, President Carter issued Proclamation No. 4771 ordering only male citizens and resident aliens of the United States who were born in 1960 or 1961 to register for the draft beginning on July 21, 1980.

III. SUMMARY OF ARGUMENT

All young men, fit or unfit, but no women however fit to serve, are compelled to register for potential conscription into the Armed Forces. Lacking any genuine justification in military or other considerations, this is an invidious discrimination from which the Due Process Clause of the Fifth Amendment should provide relief. The General Counsel for Selective Service himself opined that "to meet current constitutional law requirements, any system of registration for and induction into the armed forces must include both men and women." *Improving Capability To Mobilize Military Manpower: A Report By The Director of Selective Service—Draft Working Document,* 16 Jan. 1980, p. 27 (R1802).

Governmental decisions to subject men alone to a burden from which women are automatically exempt deny equal protection and hence violate due process unless they "serve important governmental objectives" and are "substantially related to the achievement of those objectives." *Craig v. Boren,* 429 U. S. 190, 197 (1976). *See also, Orr v. Orr,* 440 U. S. 268, 279 (1979). When the burden in question is compulsory registration for the pool of potential military draftees, at least that standard of review applies, because registration places in jeopardy basic personal liberties and ultimately life itself. Which groups will be placed in jeopardy and which groups never threatened requires a standard of special sensitivity. *Cf., Hampton v. Mow Sun Wong,* 426 U. S. 88, 102-03 (1976). This Court has never countenanced either the confusion or the inequity that would accompany any effort to carve out special exemptions from the unitary standard articulated in *Craig* for gender-based classifications. The fact that conscription diminishes fundamental liberties of the draftee also requires heightened scrutiny of the manner in which that burden is imposed.

Schlesinger v. Ballard, 419 U. S. 498 (1975), found "complete rationality," *id.* at 509, in the Navy's willing-

ness to give female officers more time than dissimilarly situated male officers to win promotion before being discharged under an "up or out" system. Nothing in *Schlesinger* supports reduced scrutiny of rules bearing on the military. The Navy's differential treatment of those unpromoted men and women was carefully designed to offset the reduced opportunities for promotion of the affected women, and was carefully tailored so as *not* to apply where equal assignments and promotion opportunities were open to both sexes. In upholding such differential compensatory treatment, this Court suggested no special deference to military needs or judgments.

On the contrary, as the Government concedes, nondeferential scrutiny was applied by this Court in striking down a gender-based discrimination in the compensation scale for military personnel, *Frontiero v. Richardson,* 411 U. S. 677 (1973), a matter bearing directly on military incentives and morale—and a matter wholly internal to the military. If a heightened standard of equal protection review is required even in that setting, one which involves internal military management, it is plain that the Court's relatively relaxed scrutiny of restraints on political liberty *within military enclaves* [30] should not be imposed as a similarly uncritical equal protection standard here. Military enclave cases are peculiarly inapposite to this case, for we deal here with discriminatory rules that are directed not at military personnel but entirely at civilians—rules linked with the military only indirectly, through their effect upon the pool of registrants from which draftees may be selected by a civilian agency in accord with the Armed Forces' expressed needs. There is no precedent for the problems of principle and practice that would attend the Government's proposed dilution and fragmentation of standards for the judicial review of official gender discrimination.

Whatever the proper standard of review, it is clear that the decision by Congress in 1948 to authorize the registration of men but not of women cannot survive scrutiny.

30. *See, e.g., Brown v. Glines,* 100 S. Ct. 594 (1980).

Presidents since Franklin Roosevelt and military leaders since Dwight Eisenhower have sought to break down the total exclusion of women from registration. Most recently, both the President as Commander-in-Chief and the leaders of the entire military establishment have stated that excluding all women from registration is not only inequitable but militarily and economically senseless, and even counterproductive.

That this is so becomes evident as soon as one reflects upon the irrationality of registering only men—fit and unfit—for a military pool that excludes age-qualified persons on no ground but gender, while it supplies potential draftees for a military force increasingly composed of women as well as men.

More particularly, both the military and Congress have made concerted efforts over the last decade to increase the role of women in the Armed Forces. These efforts obviously would not have been undertaken if military policymakers and legislators thought that expanded roles for female soldiers were inimical to an effective national defense. Moreover, defense experts have testified before Congress and before the court below that the inclusion of women in draft registration would enhance, rather than diminish, military flexibility—something that could be particularly important in an emergency situation, when many of the best qualified individuals for non-combat roles would be women and their availability would free more combat trained soldiers for quicker redeployment to battle.

Second, even the desire to keep females from participating in the full range of combat roles could not justify the complete exclusion of women from draft registration. The various combat exclusions for females, many of which are being relaxed, are not at issue here; most military assignments in war or peace are of a non-combat variety. The most authoritative estimates from the Pentagon indicate that tens of thousands of positions remain open for women draftees—even after the military's rotation goals are satisfied and the probable number of female volunteers is taken

into account. The alleged inconvenience in having to subdivide registrants into combat and non-combat pools is already inherent in the challenged registration system, which requires all age-eligible men—even those who are clearly incapable of combat service—to register. The Director of Selective Service, Appellant in this Court, has testified that there would be no additional burden in registering women.

Third, it is constitutionally irrelevant that it may be "unnecessary." to include women in the sense that enough men are available to fill all military positions. The fact that it might not be necessary to *include* a group of individuals obviously does not mean that *excluding* that group sufficiently serves some substantial end to pass constitutional muster.[31]

In sum, any fear that military flexibility and effectiveness will be hindered by the inclusion of women in the pool of registrants is wholly unfounded. Evidence demonstrating the successful performance of women soldiers has been so convincing that Congress and the military have consistently attempted to recruit more women. The pointlessness of all-male registration was evident to the court below from the evidence provided through the Government's own experts and through the judgments expressed both by Congress and by the military in their attempts to increase the participation of women. The lower court's review of all-male draft registration system thus did not supplant legislative judgments with judicial policymaking. Rather, such review—which is characteristic of searching examination of legislative motivation in other sex discrimination cases mandated by this Court—exposed the justifications offered for not registering women as merely

31. No mention of any of the rationalizations for male only registration cited by the Government appears anywhere in the history of the MSSA and thus must be regarded as *post-hoc* justifications, which are irrelevant in gender discrimination cases. See, Section IV(B), *infra*.

after-the-fact rationalizations never actually entertained by Congress, but supplied solely for litigative purposes.

Because this gender-based classification is the product of nothing beyond the archaic—and no longer even arguably defensible—idea that men are meant for war and women solely for the home and hearth, an exclusively male registration for the military draft merely perpetuates the ancient sexual stereotypes that this Court has consistently condemned as carriers of self-fulfilling prophecy. The lower court's decision should thus be summarily affirmed.

IV. ARGUMENT

A. Male-Only Registration Must Pass the Heightened Scrutiny Applied to Gender Discrimination Cases

The district court "combed the record and the legislative history for purported justifications for the total exclusion of women from the MSSA", and found "each proffered justification unconvincing." Jur. St., 23a. It therefore held that the male-only draft registration mandate failed to meet the heightened standard of review for gender-based classification first enunciated by this Court in *Craig v. Boren,* 429 U. S. 190 (1976). Appellant acknowledges that gender based classifications must ordinarily be judged under this standard. (Jur. St., 8-9). But Appellant then attempts to avoid the *Craig* standard in this case by carving out an exception for "statutory classifications geared to national defense needs", where deferential "rational relationship" scrutiny would apply. (Jur. St., 7-8).

Appellant's argument rests solely on the inapposite *Schlesinger v. Ballard,* 419 U. S. 498 (1975), and virtually ignores *Frontiero v. Richardson,* 411 U. S. 677 (1973), this Court's only precedent actually ruling on sex-discrimination in the military. (Jur. St., 9, n. 10). On analysis, both cases and the Court's other precedents demonstrate that the District Court's application of the heightened

standard of review announced in *Craig* and applied uniformly to test gender discrimination since 1976 was in all respects proper.

On the other hand, adoption of such an exception would further complicate equal protection jurisprudence, and would cause great uncertainty when the classification is based on more than one constitutional power, or when the source(s) of the power is unclear. Moreover, even if it were conceivable that the Court might carve out such an unprecedented and unworkable exception for classifications which directly and substantially affect the internal operations of the military, it should not do so in the limited circumstances of this case, where the classification has nothing to do with the internal operations of the military, and instead directly affects an entire civilian population of persons not yet part of the military or subject to military control.

1. Gender-Based Classifications Are Appropriately Judged Under a Standard of Heightened Scrutiny.

In *Craig v. Boren*, 429 U. S. at 197, the Court held that, "[t]o withstand constitutional challenge, . . . classifications by sex must serve important governmental objectives and must be substantially related to those objectives."

Starting at least with *Reed v. Reed*, 404 U. S. 71 (1971), this Court has held that rationally serving "legitimate" objectives (in *Reed*, reducing the workload of probate courts and avoiding familial controversies) was not sufficiently important to justify gender-based classifications. Two years later, as Appellant concedes, *Frontiero* applied a test of "heightened scrutiny" to a statute governing personnel matters entirely internal to the military. (Jur. St., 8).

The explicit requirement in *Craig* of an elevated review standard for gender-based classifications simply summarized and confirmed this Court's evolving precedents. *See also, Stanton v. Stanton*, 421 U. S. 717 (1975). Since

Craig, the Court has repeatedly reaffirmed the principle that gender-based legislation must be tested by this more stringent standard. *Wengler v. Druggists Mutual,* 100 S. Ct. 1540 (1980); *Califano v. Westcott,* 443 U. S. 76, 89 (1979); *Orr v. Orr,* 440 U. S. 268, 279 (1979); *Califano v. Webster,* 430 U. S. 313, 316-17 (1977); *Califano v. Goldfarb,* 430 U. S. 199, 210-11 (1977). *See also Personnel Administrator of Massachusetts v. Feeney,* 442 U. S. 256, 273 (1979) (explicit gender classification requires "exceedingly persuasive justification"). Last term the Court made clear that "[t]he burden is on those defending the discrimination to make out the claimed justification." *Wengler v. Druggists Mutual,* 100 S. Ct. at 1546.

Since *Reed,* the Court has also made clear that in scrutinizing legislative gender classifications it applies two basic principles. First, over-broad generalizations concerning one sex or the other no longer can be used to substitute for functional, gender-neutral means of distinguishing between classes of individuals,[32] *Orr v. Orr,* 440 U. S. at 279 (1979); *Califano v. Westcott,* 443 U. S. 76 (1979); *Califano v. Goldfarb,* 430 U. S. at 88 (1977), and the same standard will apply whether the sex discriminated against is male or female. *Orr v. Orr,* 440 U. S. at 279; *Wengler v. Druggists Mutual,* 100 S. Ct. at 1547.

Second, the Court has consistently rejected use of "sex as a proxy for need" in furthering even important legislative objectives.[33] In *Orr,* for example, the Court

32. Patterning legislation to match those stereotypes is particularly pernicious, for it casts the weight of government on the side of the stereotype. It manifests a legislative assumption that the stereotype not only is, but will and ought to be, accurate. *Stanton v. Stanton,* 421 U. S. at 14-15. *See also* Johnson & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 *N. Y. U. L. Rev.* 675, 725-26 (1971).

33. Notwithstanding the MSSA's reference in § 1(c) to both "obligations and privileges" of conscriptive service, involuntary registration and conscription is in large measure a burden, whose lifting from women is viewed as a favor by some. But deeper reflection reveals the paternalistic attitude motivating the "exemption" of

held unconstitutional an Alabama alimony statute which authorized the imposition of alimony obligations on husbands, but not on wives.

In short, Appellant's argument for application of the rational relationship test to Section 3 of the MSSA flies in the face of the consistent evolution during the past decade of a stringent standard of review for legislated gender classifications. This Court recently summarized this steady course of its judgments:

> Classifications based upon gender not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. . . . This Court's recent cases teach that such classification must bear a close and substantial relationship to important governmental objectives. . . .

Personnel Administrator of Massachusetts v. Feeney, 442 U. S. at 273.

2. Schlesinger v. Ballard Neither Applies Nor Supports the Application of the Rational Relationship Test to Gender Distinctions in This Context.

Appellant's sole authority for the application of a minimal scrutiny standard to sex discrimination "geared

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33. (Cont'd.)

women from military duties. Such "protection" denies women equal political stature with men. *See,* Ruhn, Constitutional Law—Equal Protection—Sex Discrimination—Selective Services Laws, [1976] *Wis. L. Rev.* 330, 347. The nexus between exclusion from the military and second-class citizenship has long been recognized. From history of Europe, which reveals that only the political elite were allowed to bear arms or serve as military leaders, to our own past, which demonstrates that there was resistance to blacks' full participation in the military, there has been consistent association of military service with full political rights. *See,* Goodman, "Women, War and Equality", 5 *Women's Rights Law Reporter* 243, 246-248 (1979). In no way has exemption from registration ever been viewed as, nor has the government ever argued that it is, remedial of past discrimination in the military or civilian spheres.

to national defense needs"[34] is *Schlesinger v. Ballard.* In this Court, the Government argues that *Schlesinger* applied the "rational basis standard."[35] In the District Court, the Government more accurately characterized *Schlesinger* as a case where "the Court did not specify the standard of review it was applying."[36] Of course, the Government's most accurate description of *Schlesinger* was to Congress, where it described the case as one in which not a single Justice accepted the argument that the decision employed a standard "based upon defering (*sic*) to military needs."[37] In fact, there is not one word in *Schlesinger* or in any other opinion of this Court which suggests that the standard of review might vary depending upon the clause of Article I, § 8 exercised in legislating.

At trial, the Government urged *Schlesinger* as supporting a rational basis test in cases involving military matters. After careful analysis, the trial court correctly rejected that argument. (Jur. St., 18a-19a). As the district court noted, *Schlesinger* was a case where (1) there was no disparate treatment of similarly situated individuals, and (2) this Court expressly rejected administrative convenience as a basis for the different treatment of even dissimilarly situated males and females. The trial court's analysis is plainly correct. If *Schlesinger* supported Appellant's extraordinary reading, it would have overruled *Frontiero,* which did apply heightened scrutiny to legislation passed under the power to raise and support armies. However, the continuing vitality of *Frontiero* is

34. Jur. St., 8.

35. Jur. St., 7, 10.

36. Since the classes were dissimilarly situated it was unnecessary for the Court to articulate or apply any equal protection standard. The case was decided on grounds which obviated the need for any equal protection analysis of the Government's proffered justification of the dissimilar treatment.

37. R1070-71, cited *supra,* n. 12.

attested to by this Court's citation of it in both *Schlesinger*, 419 U. S. at 506 and *Craig*, 429 U. S. at 198.

In *Schlesinger*, certain male Naval officers had only nine years in which to be promoted or be involuntarily discharged, while female officers of similar grade had thirteen years to secure promotion. But because legislative and policy restrictions prevented the female officers from having shipboard assignments or combat duty which would lead to more rapid and favorable consideration for promotion, the males and females issue were not similarly situated. 419 U. S. at 508. This contrasts sharply with the situation in *Reed*, where the statute preferred men over otherwise "similarly situated" women,[38] and in *Frontiero*, where the statute mandated "dissimilar treatment for men and women who [were] similarly situated."[39] Significantly, *Schlesinger* stresses Congressional reliance on the dissimilar situation because where male and female officers were eligible for equivalent assignments, "Congress has not differentiated between them with respect to tenure." 419 U. S. at 509.

This Court has repeatedly emphasized that *Schlesinger* was a judicial response to a situation where the discriminatory assignment regulations had left the sexes "not similarly situated," and left women disadvantaged. Thus the alleged discrimination in *Schlesinger* was the recognition and partial redress of an existing imbalance in the opportunities afforded men and women in the Navy. *Orr v. Orr*, 440 U. S. at 281; *Califano v. Webster*, 434 U. S. at 317-18 (1977).

Even disparate treatment between men and women who were *dissimilarly* situated had to pass a much more rigid test in *Schlesinger* than the Government now urges for the admitted[40] discrimination in this case. "Administrative convenience" has often sufficed as justification for

38. 404 U. S. at 77.

39. 411 U. S. at 690-91.

40. Answer to Complaint, ¶ 29 (R13).

statutory classifications reviewed under the rational relationship test.[41] It is insufficient under heightened scrutiny. *Reed,* 404 U. S. at 76. It was specifically rejected in *Schlesinger,* even as a basis for differentiating between *dissimilarly* situated men and women. 419 U. S. at 510. The "complete rationality", *id.* at 509, of the legislative distinction required in *Schlesinger* plainly looks beyond the rational relationship test urged by Appellant.[42]

Schlesinger is inapplicable to the instant case for another reason which calls for the application of heightened scrutiny here. The burden of the "up or out" promotional system in *Schlesinger* did not infringe upon anyone's fundamental rights. By contrast, it is undeniable that conscription necessarily causes a general diminution of the fundamental rights of the conscript. *Raderman v. Kaine,* 411 F. 2d 1102, 1104 (2d Cir. 1969); *United States v. Offord,* 373 F. Supp. 1117, 1118, (E. D. Wis. 1974).[43] Registration puts into jeopardy those rights which

41. Jur. St., 18a-19a.

42. In *Schlesinger,* the Court relied upon the self-correcting nature of the legislative process. 419 U. S. 510, n. 13. Here Congress has failed to enact all proposals to cure the discrimination by legislation, and it is clear that only the courts can uphold the Constitution in this situation. *Cf., Frontiero,* 411 U. S. at 692 (Burger, C. J., concurring). *Compare, Reed,* 404 U. S. at 74, n. 4.

The significance of the *Schlesinger* Court's explicit rejection of the rationale of the rational relationship test, and its implicit rejection of the test itself, is underscored by the fact that in *Schlesinger* the Solicitor General also urged a military exemption to heightened scrutiny. *Schlesinger v. Ballard.* Brief for Appellant, p. 20. Even the argument urged on the Court here is familiar.

> "[i]t is particularly important in the context of this case that the courts accord to the legislature significant flexibility as to classification based on sex, because the issue here relates closely to the organization, maintenance and effectiveness of the armed forces." *Schlesinger v. Ballard,* Brief for Appellant, 9.

43. For example, service regulations may require prior base commander approval for circulation of petitions to Congress. *Brown*

are surrendered with induction. The constitutional issue presented is not diminished merely because the loss of those rights is not certain as to all members of the affected class. *See, Shapiro v. Thompson,* 394 U. S. 618, 634 (1969). Any classification or discrimination which imposes, directly or indirectly, a burden upon one group's enjoyment of fundamental rights is constitutionally suspect and must pass a "critical examination". *Zablocki v. Redhail,* 434 U. S. 374, 383 (1978). Indeed, in upholding the abridgement of the religious beliefs inherent in denying conscientious objection to a particular war, this Court required the burden to be "strictly justified by substantial governmental interests that relate directly to the very

43. (Cont'd.)

v. Glines; Sec'y of Navy v. Huff, 100 S. Ct. 606 (1980). The right to disseminate or receive otherwise protected political literature on military bases is curtailed in the military context. *Greer v. Spock,* 424 U. S. 828 (1976). Generally, "speech that is protected in the civil population," *Parker v. Levy,* 417 U. S. 733, 759 (1974), may be subject to prior restraint because "the different character of the military community and the military mission requires a different application of those protections." 417 U. S. at 758. Generally, "the rights of military men must yield somewhat ' "to meet certain overriding demands of discipline and duty" ' . . ." *Brown v. Glines,* (citations omitted) 100 S. Ct. at 599. The fact of service in the military or regulations imposed by the military authority diminish or regulate, in ways which would not be permitted in civilian life, fundamental interests such as the right to marry, *Zablocki v. Redhail,* 434 U. S. at 383; *Loving v. Virginia,* 388 U. S. 1, 12 (1967); the right to procreate, *Skinner v. Oklahoma,* 316 U. S. 535 (1942); the right to raise one's children in one's home, *Meyer v. Nebraska,* 262 U. S. 390, 399 (1923); the right to travel interstate, *Shapiro v. Thompson,* 394 U. S. 618 (1969); and the right to full procedural due process as the term is understood in civilian criminal proceedings, *Griffin v. Illinois,* 351 U. S. 12 (1956). See: *O'Callahan v. Parker,* 395 U. S. 258, 262-65 (1969), for a listing of the substantive and procedural differences between civilian and military due process, and the justification for the differences.

impacts questioned." *Gillette v. United States,* 401 U. S. 437, 462 (1971).

3. Frontiero Requires a Test of Heightened Scrutiny in This Case.

Schlesinger does not govern this case; *Frontiero* does. In *Frontiero,* the Court declared unconstitutional laws under which military men received a housing allowance and health care for their civilian wives while military women received these family benefits only if they supplied over three-quarters of the couple's support. Although these laws were within the ambit of the Congressional power "to raise and support" armies, Article I, § 8, cl. 12, the same clause under which the MSSA was passed, Appellant concedes that heightened scrutiny was applied in testing and rejecting the sex discrimination of those laws. (Jur. St., 8). By contrast, the promotion laws at issue in *Schlesinger* would seem to be based upon the power "to make Rules for the Government and Regulation of the Land and Naval forces. Art. I, § 8, cl. 14. The natural reference for the applicable standard for equal protection challenges to gender discrimination in statutes passed under clause 12 of Article I, § 8 is thus *Frontiero,* not *Schlesinger.*

Appellant's footnote attempt to distinguish *Frontiero* on the ground that the statute there related to "financial compensation", not "military preparedness" (Jur. St., 9, n. 10) misses the point. Promotion and compensation are two related facets of military personnel management, which largely determines the composition and preparedness of the Armed Forces, and also governs the internal workings of the military. Compensation and family living conditions, no less than promotion, intimately relate to the morale of military personnel. And morale, in turn, has an indisputable impact upon military effectiveness. When pay and benefits are critical to attracting and retaining suitable personnel, *Frontiero* is at least as much a military regulation case as is *Schlesinger.* So evaporates Appellant's proffered distinction of *Frontiero.*

Furthermore, the *Frontiero* classification involved economic regulation, to which reduced scrutiny has traditionally applied. Thus, in *Frontiero,* application of a deferential standard of review might have been expected, if gender based discrimination was not subject to heightened scrutiny even in the military. Since the Court did *not* accord the *Frontiero* statute unusual deference, it follows *a fortiori* that male-only registration—which is *not* economic regulation—should not be accorded unusual deference.

4. The First Amendment Military Precedents Are Inapplicable.

The Government's analogy to "First Amendment cases arising in defense contexts" (Jur. St., 10) fails to support minimal scrutiny of male-only registration. While it is true that considerations of military discipline and morale may justify a reduction in the breadth of exercise of a *soldier's* First Amendment rights, each military case cited by Appellant involved matters *wholly internal* to the military. *Brown v. Glines* was a challenge to Air Force regulations that require *members of the service* to obtain approval from their commanders before circulating petitions *on Air Force bases. Greer v. Spock* involved a ban on political speeches *on military bases.*[44] But registra-

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44. Reliance upon *United States v. Macintosh,* 238 U. S. 605 (1930) is misplaced. It was not a First Amendment Case. The issue was whether an applicant for citizenship had discharged his burden of proving that his views were not opposed to the principle that a duty of a citizen is to defend the country against all enemies, by force of arms when necessary. The Court, in reaching its conclusion that the applicant had failed to discharge his burden, made the following statement to which Appellant apparently alludes at page 11 of his Jurisdictional Statement:

> From its very nature the war power, when necessity calls for it exercise, tolerates no qualifications or limitations *unless found in the Constitution* or in applicable principals of international law. (emphasis added) 283 U. S. at 622.

tion under the MSSA is imposed only on civilians. 50 U. S. C. App. § 453. Selective Service is a civilian operation, regulating only civilians. An independent civilian agency[45] first screens from all registrants those who are eligible to serve; and then that same civilian agency further selects those of the eligibles who are needed to meet military requirements. Since conscription diminishes the rights of civilian citizens to those of soldiers[46] it is the burden imposed upon *civilian* males which is at issue in this case.

Where the rights of free civilians are even incidentally reduced by otherwise valid regulations of a constitutionally less protected group, full First Amendment scrutiny applies to the infringement on the communications. In *Procunier v. Martinez,* 416 U. S. 396 (1974), where the rights in communication of both prisoners and nonprisoners were at stake, the Court refused to relax the standard of review regarding censorship of prisoners' mail, as would have been applicable had the case involved purely internal prison messages. In response to the argument that a prisoner's rights to correspondence are fundamentally different from those of civilians, the Court was explicit:

> This line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail. 416 U. S. at 409.

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44. (Cont'd.)

Appellant's remaining case, *Snepp v. United States,* 100 S. Ct. 763 (1980), was a contract case in which explicit agreements not to publish information relating to the Agency or its activities without Agency approval were required of CIA employees as a condition of employment. *Snepp* would not support censorship of articles about the CIA published before the author had any relationship to the agency.

45. Selective Service System, 50 U. S. C. App. § 462(a).

46. See *supra,* at 29-30, n. 43.

Thus, even if induction under the MSSA is the interface of the military and civilian worlds, and registration of civilians is somehow elided into that interface, analogy to First Amendment doctrine not only fails to support Appellant's position but affirmatively supports application of the heightened review standard.

5. There Is No Reason in Policy or in the Constitution to Dilute the Standard of Review.

Quite apart from conflicting with prior precedents in this Court, the Government's argument would constitute a dangerously open-ended precedent. As the District Court pointed out:

> It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible constitutional violations committed by the Congress or the executive in exercising war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of citizens and therefore may be the one most in need of an appropriate check and balance. (Jur. St., 19a).

"There is only one Equal Protection Clause." *Craig*, 429 U. S. at 211 (Stevens, J., concurring). This Court has always been sensitive to the dangers of granting extraordinary significance to statutes "justified" under the war power or enacted for the national defense.[47]

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47. "Not one of these safeguards can the President, or the Congress, or the Judiciary disturb except the one concerning the writ of *habeas corpus*." *Ex parte Milligan*, 71 U. S. 2, 125 (1866).

See also Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U. S. 146, 156 (1919) (The war power of the United States, like its other powers and like the police powers of the states, is subject to applicable constitutional limitations); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88-9 (1921); *United States v. Robel*, 398 U. S. 258, 263-64 (1967).

Far from "reassess[ing] the evidence" before Congress,[48] the District Court properly discharged its duty to ensure that statutes conform to the Constitution. *Marbury v. Madison,* 5 U. S. (1 Cranch) 137, 179-180 (1803):

> "From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature.
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> • • •
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> "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank." (emphasis in original)

If the war power dictates undemanding examination of classifications which otherwise require heightened scrutiny, that must logically include deferential scrutiny of racial discrimination—without requiring any showing of "necessity" or "compelling interest". Under Appellant's theory, a draft registration limited to or excluding all blacks or Hispanics would face only minimal scrutiny on the theory that there is no military need for racial mixing. Similarly, the resegregation of present Army units could be defended under the rational relationship test as a purely internal military matter, administratively convenient because there have been racial incidents in integrated units.

In sum, Appellant seeks an unwarranted and unprecedented retreat from the elevated standard of review that was foreshadowed by *Reed,* applied in *Frontiero,* articulated in *Craig,* and repeatedly affirmed since. The argument should be rejected for what it is—an attempt to avoid the ineluctable result of the application of the

48. Jur. St., 6.

Craig standard to this case, without regard for history, precedent or policy.

B. The Judgment Below Should Be Affirmed Because the Deliberations of Congress in 1948 Disclose No Justification for Male-Only Registration in the MSSA

Even if the conclusions of the majority of the Senate Subcommittee on Manpower and Personnel, S. Rep. 96-826 (see p. 5, *supra*), were well founded in facts, such conclusions could not save the MSSA because consideration of "mobilization flexibility" played no role in its enactment. Under *Craig,* the *post-hoc* rationalization of a Congressional subcommittee in 1980 cannot be considered when a reviewing court assesses the constitutional adequacy of reasons for the exclusion of women from registration in a 1948 statute. 429 U. S. at 199, n. 7. Under heightened scrutiny, only evidence of actual legislative intent, reasons in fact expressed at the time of the passage of the challenged statute, may be invoked to defend discriminatory legislation. *Califano v. Westcott,* 443 U. S. at 86-88; *Weinberger v. Wiesenfeld,* 420 U. S. 636, 648 (1975).

Since, as is admitted in this case (*see* pp. 4-5 *supra*), Congress provided absolutely no reason for male-only registration in 1948, the gender discrimination in the MSSA can plausibly be explained only as:

> "part of the 'baggage of sexual stereotypes,' Orr v. Orr, 440 US, at 283, 59 L Ed 2d 306, 99 S Ct 1102, that presumes the father has the 'primary responsibility to provide a home and its essentials,' Stanton v Stanton, 421 US 7, 10, 43 L Ed 2d 688, 95 S Ct 1373 (1975), while the mother is the 'center of home and family life.' Taylor v Louisiana, 419 US 522, 534 n 15, 42 L Ed 2d 690, 95 S Ct 692 (1975). *Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment.*" *Califano v. Westcott,* 443 U. S. at 89 (emph. supplied).

Here it is admitted that there was no consideration of any proper purpose for excluding women in the history of the MSSA. Instead, as the District Court noted, upon undisputed evidence, the MSSA was enacted when "an aura of male chauvinism permeated Congressional attitudes toward women in the military." (Jur. St., 23a, n. 15). As in *Cleveland Board of Education v. LaFleur,* 414 U. S. 632 (1974), the "after-the-fact rationalizations proposed by [Appellant] are unsupported in the record."[49] as being what Congress actually had in mind when it enacted male-only registration.

C. The Judgment Should Be Affirmed Because Even the Subcommittee Conclusions Are Insufficient Under Any Standard to Justifying the Male-Only Registration Enacted in 1948

One of the differences between minimal and heightened scrutiny is that under the former analysis some amount of hypothesizing as to valid, but unexpressed legislative purposes is tolerated. But even that permissible deduction of purpose must be at least consistent with, and not refuted by, the legislative scheme and history under scrutiny. *Weinberger v. Wiesenfeld,* 420 U. S. at 648, n. 16.[50] Where legislative purposes are advanced in this Court to defend a classification from equal protection attack, the superficial plausibility of the rationale will not save the statute "when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[51] It was precisely that exposure to logical and historical inquiry which refuted the argument of "flexibility of per-

49. *LaFleur,* 414 U. S. at 653 (Powell, J., concurring); *See also, Weinberger v. Wiesenfeld,* 420 U. S. at 648.

50. The District Court found that the hyptothesized justification of flexibility and military need was inconsistent with history and unsupported by fact in 1948 and in 1980.

51. Weinberger v. Wiesenfeld, 420 U. S. at 648, n. 16.

sonnel management"[52] as "superficially appealing, but . . . found lacking upon closer examination."[53]

Where the record demonstrates that illegitimate or insufficient objectives were at work when a statute was passed, the "initial primacy [of the historical purpose] casts its shadow" over the later adjudication of the constitutionality of the statute.[54]

Moreover, where the contemporaneous record of the enactment is silent as to the later proffered purpose, hypothetical justification will not avail where the impact upon the liberty of the burdened class is substantial. *Hampton v. Mow Sun Wong,* 426 U. S. at 115-16. The potential for injury to important "liberty" interests present in being a member of the class which must register for the draft is grave and pervasive.[55] *Califano v. Goldfarb,* 430 U. S. at 199. There is no room here for indulgence in the Government's hypotheses, particularly where the District Court has detailed both the history of the discrimination and the illogic of its newly devised justifications.

The fact that we deal here with gender discrimination in registration for conscription, a context which traditionally was viewed as a male preserve, makes the lack of explicit consideration by Congress[56] of any justification for male-only registration most telling, if not dispositive, as to the actual reasoning behind the provision. Mr. Justice Stevens' observation in dissent in *Mathews v. Lucas,* 427 U. S. 495, 520-21 (1976), applies with force in this case:

> "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to dis-

52. Jur. St., 29a.

53. *Id.,* 30a.

54. *LaFleur,* 414 U. S. at 653 (Powell, J., concurring).

55. *Supra,* at n. 43.

56. R1713-14.

> tinguish between male and female . . . But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination to the stated purpose for which the classification is being made."

What makes this case so plainly ripe for summary affirmance is that *especially* if the facts adduced in the 1980 hearings are considered, the classification by sex in the MSSA is indefensible.

D. The Record Amply Supports the Factual Findings and Conclusions of the District Court That Male-Only Registration Is Not Positively Correlated to the National Defense [57]

The principal argument of Appellant, both at trial and on appeal has been that the registration of women would undermine the flexibility of the Armed Forces in time of mobilization or war. The District Court found, to the contrary, that:

> "it is the antithesis of 'flexibility' to exclude women from the pool of registrants that could be called upon in a time of national need." (Jur. St., 43a).

The District Court concluded that:

> "The record here . . . reveals that women do serve a useful role in the military and provide important skills. The foregoing discussion also illustrates that flexibility is not enhanced, but is in fact limited by the complete exclusion of women. We therefore hold that the complete exclusion of women from the pool of registrants does not serve 'important governmental ob-

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57. On direct appeal to this Court, the factual findings of "the District Court are, of course, governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully . . . as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corp.*, 415 U. S. 486, 508 (1974). *See also United States v. United States Gypsum Co.*, 333 U. S. 364, 394 (1948).

jectives' and is not 'substantially related', *Craig v. Boren, supra,* at 197, to any alleged government interest." (Jur. St., 43a).

The factual findings of the District Court which led it to this conclusion were based almost entirely upon the testimony given and documents produced by Appellant and other federal officials, primarily senior personnel of the Department of Defense[58] and of the Armed Forces. The District Court relied upon the shared views of the President and the nation's military and civilian defense officials in concluding that flexibility was not enhanced by gender discrimination in registration. The facts found by the trial court are detailed at Jur. St., 31a-43a.[59] To avoid repeating that comprehensive discussion, and because the administration's testimony before Congress was presented in Section II(E) above, Appellees present to the Court only a summary of the significant additional record support for the findings of the District Court, organized by source.

1. The Senior Military Officers and Military Studies

Since 1948, the senior officers of the Army have testified in favor of including women in the draft.[60] As the District Court noted, each of the Joint Chiefs of Staff testified in the Senate Subcommittee in 1979, even before the Administration proposed to amend the MSSA, in favor of female registration. (Jur. St., 39a, n. 30). The problem

58. Plaintiffs tried without success to join the Department of Defense and Department of the Army as Defendants. See Order of July 27, 1976, denying plaintiff's Motion to Join Further Defendants.

59. Plaintiffs' Proposed Findings of Fact were submitted to the trial court on July 2, 1980. Defendants did not request any findings of fact prior to the July 18 Memorandum Opinion, nor did they thereafter seek to challenge or amend the facts found in the District Court. Appellant is therefore limited to challenging the sufficiency of the evidence for those findings under the "clearly erroneous" standard. Fed. R. Civ. P. 52(b).

60. *See,* p. 11, above.

of "flexibility" in available combat replacements arises only if "the support base and the operating base to the rear consist in large measure of women."[61] For precisely that reason, when asked for the number of female conscripts to be utilized in a mobilization for a war in Europe with the Warsaw Pact nations, the Services replied that they could best use 80,000 women in the third through sixth months of mobilization. (Jur. St., 31a-32a). The "non-impact" of drafting women upon the Army's ability to "reach back" to combat trained and available support troops is plain from the Army's own studies.

Evaluation of Women in the Army ("EWITA") (March 1978) (R637-846) computes the theoretical maximum female content of the Army enlisted ranks at current force levels under the assumption of a "European scenario" war with the Soviet Union. (EWITA, I-17, (R666)). This is the scenario in which the need for combat soldiers would be greatest, and the need for women the least. Even under those circumstances, Table 1.7 (EWITA, I-26 (R675)) shows that of 589,200 present enlisted positions, only 261,700 would be closed to women for reasons of combat exclusion. Of the remaining 327,500 "interchangeable positions", promotional/rotational considerations close another 47,700 positions and the "flexibility for combat" relied upon by the Government closes only another 120,000. This leaves a theoretical female component acceptable to the Army of 159,700 positions (27%) in the current force structure of that one Service. This is more than twice the actual number of women in the Army.[62]

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61. Testimony of General Rogers before the Senate Subcommittee on Manpower Personnel (March 13, 1979) (R1222).

62. The all-Service goal of 250,000 women in a total peacetime volunteer force of 2,000,000 persons leaves 1,750,000 males available to be "flexed" into combat. The Armed Forces' induction projections of 80,000 women and 570,000 men in 6 months would yield, by addition to the peacetime force, 330,000 women and a 2,650,000 person total force. In addition, the nearly all male Reserve

Clearly, the number and percentage of males available for combat will not be seriously diminished by drafting women.

General Tice also testified that even in wartime, conscripts are placed in non-combat specialties, including traditionally "female" positions. Tice Deposition, 10-11 (R1634-35). He acknowledged that substantial numbers of women could be used in wartime, and that the ratio of male to female draftees ought to be a matter of military judgment. Tice Deposition, 18, 35-36 (R1642, 1659-60).

As Lieutenant General Moore testified, the Army would have to look to the circumstances at hand to decide whether women should be drafted at a given time. He further testified that existing unit Max-Wac (maximum female content) levels took into account the need for combat flexibility. Deposition of Lt. Gen. Harold W. Moore, 71, 81-82 (R1491, 1501-02).

In assessing the adequacy of the record support for the trial court's conclusion that flexibility is not served by depriving the nation of the talents of 51 percent of the draft age population, this Court should note the additional military studies reflecting the Army's history of increased utilization of women which also formed a substantial basis for the trial court's findings.

For example, Chapter 3 of *"America's Volunteers"* [63] summarizes much of the empirical literature on the utilization of women. Two points bear emphasis. First, "even in the traditional occupations [administrative and clerical positions] there is room for growth in the number of

62. (Cont'd.)

Combat Units and Individual Ready Reserve would also be added to the force. Deposition of Assistant Secretary of Defense Pirie, 19-26 (R1590-1597); Deposition of Principal Deputy Assistant Secretary of Defense Danzig, 7-8 (R1605-1606); Deposition of Major General Tice, Deputy Assistant Secretary of Defense for Military Personnel Policy 19-20, 22-23 (R1643-44, 1646-47).

63. *America's Volunteers, A Report on the All-Volunteer Armed Forces,* Dec. 31, 1978 (R287-314).

women." *America's Volunteers,* p. 72 (R297A). Second, women are now employed by the Army "throughout the battlefield". *Id.,* p. 75 (R299). The current Army view of a "woman's place" is a matter of record:

> The current Army policy states: "Women are authorized to serve in any officer or enlisted specialty, except some selected specialties, in any organizational level and in any unit of the Army except infantry, armor, cannon field artillery, combat engineer, and low altitude air defense artillery units of battalion/squadron or smaller size."
>
> This means that women may be assigned to brigade level headquarters, Hawk or Hercules Missile Air Defense Units, missile and field artillery elements such as Lance units, signal battalions and wheel and track vehicle maintenance battalions. They can fly the new Blackhawk helicopter in non-direct combat roles and now some positions in the elite units such as the 82d and 101st Airborne Divisions are open to women. Policy, however, restricts them from serving in an attack or scout role.

America's Volunteers at 75 (footnote omitted) (R299).

The empirical basis for the wider deployment of female soldiers is impressive:

> From these directives, it is clear that women soldiers are an important and integral part of the Army. They will be expected to pull their share of the workload in the combat environment as do men in the same MOS, but will not be assigned to certain of the most arduous combat units or skills.
>
> These changes in Army policy are not whims, but are based on extensive study. One such study is called "Women Content in the Army (WITA). As part of WITA, in 1976, the Army conducted major tests on the impact of female participation in company size units. Units were tested in three-day field exercises

with from 0% to 35% women. The results of those test (called MAXWAC) showed no degradation in unit performance as a result of female content.[8] A second part of WITA was conducted in 1977. During the major NATO exercise, REFORGER-77 conducted in the fall of 1977, the effect of women in units on sustained operations was tested. This test, called REFWAC,[9] reconfirmed the MAXWAC results. Women soldiers can and do perform well in combat support units in the field as well as in garrison. There is no significant difference in the performance of those kinds of units. Such trends as did exist showed that, if anything, the integrated units did better, especially when the number of women were above the token level and the men and women were well trained.

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8. *Women Content in Units Force Development Test (MAXWAC),* U. S. Army Research Institute for the Behavioral and Social Sciences, October, 1977.

9. *Women Content In The Army-Reforger 77,* U. S. Army Research Institute for the Behavioral and Social Sciences, 15 March 1978.

Id., at 76 (R300).[64]

2. Civilian Defense Officials

Most of the testimony to subcommittees of both Houses of Congress on the President's request for authority to register women was given by the responsible officials of the Department of Defense. The District Court relied heavily upon this testimony, and that reliance is cited throughout Section III(c) of the Memorandum Opinion of the District Court. (Jur. St., 22a-43a). Without recapitulating the trial court's Opinion or the Congressional testimony of those officials cited in Section II above, the testimony of the senior civilian Pentagon officials shall be summarized, because it is dispositive of the pur-

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64. Pertinent parts of the Reforger 77 study appear in the Record at R847, et seq.

ported justifications male-only registration raised by the Government on appeal:

1. In time of war, the number of women doing work essential to the readiness and capability of the Armed Forces would inevitably expand beyond the peacetime goal of 250,000.[65]

2. Flexibility is enhanced by having available a pool of women who are likely to have a higher concentration of clerical and administrative skills than would a random pool of young men. This would permit efficient and rapid replacement of support troops transferred into combat positions. (R1032, 1585-88).

3. It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women. Those women should be available for service in the jobs they can do, just as men will be available for jobs they can do. (R1033).

From the objective fact of the performance of the Army's female soldiers over the past forty (40) years, from the expert opinions of every major military professional and civilian defense personnel manager of record, and from the statements and actions of the President of the United States, the District Court drew upon a record which amply supports its conclusion that "the complete exclusion of women from the pool of registrants does not

65. Statement of Robert B. Pirie and Dr. Bernard Rostker Before House Subcommittee on Military Personnel, March 5, 1980 (R1030). Assistant Secretary Pirie is only recently a civilian, having retired after twenty (20) years as a Navy officer with such varied and important duties as commanding a nuclear submarine and comparing the combat capability of Soviet and United States units. (R1078, 1578-79).

serve 'important governmental objectives' and is not 'substantially related' . . . to any alleged governmental interest." (Jurs. St., 43a). In fact, under even the most cursory scrutiny, male-only registration is constitutionally indefensible on the record in this case. The findings of the District Court manifestly cannot be considered to be clearly erroneous; its conclusion should therefore be affirmed.

V. CONCLUSION

The MSSA requires, quite literally, the registration for compulsory military service of the male lame, the male halt, and the male blind. It excludes from registration and thus from conscription under any circumstances, all females, from the traditional clerk-typist to those who can crew a 155 mm. howitzer (lifting its 95 pound shell and 19 pound loading tray, carrying that load 10 feet, and sustaining fire at Army standard rates).[66] (R1750-51). The discriminatory registration provisions of the MSSA thereby deprive the nation of the full range of skills present in the female population and needed by the Armed Forces in time of war. Appellant himself admits that the system is inequitable to men and women and that it ill-serves the stated purposes of the MSSA. Accordingly, it is constitutionally indefensible—so clearly, indeed, that this Court need not call for further briefing or argument before affirming.

The granting of this Motion to Affirm need not cause any disruption to the national preparedness. Whenever an ongoing legislative or regulatory scheme requires modification in order to comport with constitutional standards, this Court may issue its mandate, staying its judgment for an appropriate time in which Congress can decide how best to remedy the constitutional or other infirmities of its prior legislation. *See, e.g., Buckley v. Valeo,* 424 U. S.

66. *U. S. Army Human Engineering Laboratory,* Ammunition Loading and Firing Test—Pretest Physical Conditioning of Female Soldier Participants (R1744-1747).

1, 143-44 (1976). If registration is deemed by Congress to be essential to our military or foreign policy, Congress can be expected speedily to enact appropriate legislation, recognizing that it "may not employ an invidious discrimination to sustain the political viability of its programs." *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 266 (1974). With that in mind, Appellees respectfully urge that the Order of July 18, 1980 be affirmed summarily, and suggest that the judgment of affirmance be stayed for thirty days.

Respectfully submitted,

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Supreme Court, U
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MICHAEL RODAK, JR.,

No. 80-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BERNARD ROSTKER,
Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO INTERVENE OF STACEY ACKER, CHRISTINA ANDRES, KATHRYN BARR, ALMEDA CANNON, ELIZABETH CREMERS, MONICA DEWIT, MARY DOLEHIDE, ESTHER GLUCKSMAN, ANNA HARRINGTON, LAURA HEADLEE, CORLISS JARRETT, KAREN JOHNSON, PAM PATRICK, FELICITY SMITH, KATHLEEN SULLIVAN, and AGNES ZEPEDA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER,
Director of Selective Service,

Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO INTERVENE OF STACEY ACKER, CHRISTINA ANDRES, KATHRYN BARR, ALMEDA CANNON, ELIZABETH CREMERS, MONICA DEWIT, MARY DOLEHIDE, ESTHER GLUCKSMAN, ANNA HARRINGTON, LAURA HEADLEE, CORLISS JARRETT, KAREN JOHNSON, PAM PATRICK, FELICITY SMITH, KATHLEEN SULLIVAN, and AGNES ZEPEDA

Stacey Acker and fifteen other female citizens of the United States between the ages of 18 and 26 hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to intervene as appellants in this case, if probable jurisdiction is noted, in order to represent, by written brief and oral argument, the interests of millions of women who will be vitally affected by the disposition

of this appeal but who are not presently parties to this litigation. As is shown more fully below, the individual Movants filed timely applications to intervene in the United States District Court for the District of Columbia when it was publicly announced that the issue decided in this case would be tested in that court. By happenstance, however, the constitutional issue was argued and first decided in the present case—a lawsuit which had received virtually no public attention and which had lain dormant for many years. As a result, the litigation in the District of Columbia (including the Movants' request to intervene) has been stayed pending disposition of this appeal. Since the Movants represent views which differ sharply from those of the Executive Branch, and since the issue presented in this case—*i.e.*, the constitutional validity of the exemption from the draft which Congress has always conferred upon women—turns on considerations beyond those relating to the efficiency of the military, participation of the Movants as parties will provide the Court with a much more complete and adverse presentation of the relevant issues than it can receive from the present parties.

STATEMENT

This case involves the constitutionality of Congress' decision to continue to exempt women from compulsory military service by excluding them from the draft registration provisions of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*

Sections 3 and 4 of the Act, 50 U.S.C. App. §§ 453 and 454, set forth which individuals are subject to registration for, and training and service in, the Armed Forces. The provisions, which are implemented "by proclamation of the President," specifically limit liability

for military registration and induction to males between the ages of eighteen and twenty-six. On March 29, 1975, in accordance with a decision to utilize an "all-volunteer" approach to fulfill the country's military needs, President Ford ordered an end to nearly 30 years of registration under the Act. *Presidential Proclamation* No. 4360, 11 Weekly Comp. of Pres. Doc. 318 (1975) (R. 192-193).[1]

The registration requirements of the Act remained suspended until this year when, largely in response to the Soviet Union's invasion of Afghanistan, Congress and the Executive Branch took steps to reinstate registration procedures. In February, the President recommended to Congress that selective service registration be reinstituted. *Presidential Recommendation for Selective Service Reform:* A Report to Congress pursuant to Pub. L. 96-107 (Feb. 11, 1980) (R. 196). Included in that recommendation was a proposal that the Military Selective Service Act be amended to provide for the registration of women as well as men. *Id.* at 24-28 (R. 221-225). After conducting hearings, Congress agreed that military registration should be reinstituted and, on June 12, 1980, passed Joint Resolution 521, which allocated $13,285,000 for salaries and expenses of the Selective Service System for the fiscal year ending September 30, 1980. H.R.J. Res. 521, 96th Cong., 2d Sess., 126 *Cong. Rec.* S6773 (1980). Congress refused, however, to follow the administration's recommendation to amend the Military Selective Service Act to eliminate the exclusion of women. The Selective Service System then promulgated new regulations setting forth procedures for an all-male registration. 45 *Fed. Reg.* 40577 1980). President Carter signed Joint Resolution 521 on June 28, 1980, and on July 2, 1980, issued Presidential

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[1] "R." refers to the Joint Documentary and Stipulated Record (Revised).

Proclamation No. 4771, 45 *Fed. Reg.* 45247. Under that Proclamation and the Selective Service regulations, males born in 1960 were obliged to register for military service during the week of July 21, 1980, and males born in 1961 were obliged to do so during the following week. Because of Congress' refusal to amend the Military Selective Service Act, women born during 1960 and 1961 were not required to register for military service.

The complaint in this suit was filed in June 1971, long before both the suspension of draft registration by President Ford and Congress' recent reconsideration of the appropriateness of excluding women from compulsory military service. The plaintiffs—men subject to military registration and induction—alleged that the Military Selective Service Act violated several of their constitutional rights, including their Fifth Amendment right to equal protection. Their application for a three-judge court under the then-applicable statute, 28 U.S.C. § 2282, was denied. 341 F. Supp. 339 (E.D. Pa. 1972). On appeal, the Court of Appeals upheld the dismissal of all of the challenges to the Act except for the sex-based equal protection claim, and remanded the case for a determination of the substantiality of that claim and of plaintiffs' standing to raise it. 480 F.2d 545 (3d Cir. 1973) (per curiam). On remand, the District Court convened a three-judge court. That court, with one judge dissenting, denied the defendants' motion to dismiss. 378 F. Supp. 766 (E.D. Pa. 1974).

For five years after the three-judge court's refusal to dismiss the suit there were no proceedings in the case. In June 1979, apparently in response to the court's proposal to dismiss the case for inaction, further discovery ensued. The court denied defendants' motion for summary judgment on February 19, 1980, and on

July 1, 1980, certified a plaintiff class of potential male registrants.

On July 18, 1980, the court issued its opinion enjoining registration under the Military Selective Service Act and denying the defendants' request for a stay pending appeal. After confirming the plaintiffs' standing to raise their equal protection challenge and finding the case ripe for review, the court held that because the Act discriminates on the basis of sex, the exclusion of women from compulsory registration and potential induction must, under *Craig v. Boren,* 429 U.S. 190, 197 (1976), and its progeny, serve "important governmental objectives and must be substantially related to the achievement of those objectives." The Court then reviewed evidence presented by the Executive Branch in support of its proposal for a gender-neutral military registration, and, relying heavily on this evidence, concluded (Juris. St.[2] 38a-39a):

> [i]t is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants available for induction.

Because the Court found it "difficult to accept the inconsistent positions of Congress" (Juris. St. 38a-39a), it held that the exclusion of women from compulsory military service could not pass muster under a heightened standard of review applied to gender-based distinctions. The Court ignored the vastly different societal impact between offering women who wish to volunteer a mean-

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[2] "Juris. St." refers to the Appellant's Jurisdictional Statement previously filed with this Court.

ingful opportunity to serve in the Armed Forces and compelling all women to do so. We believe that the court's view that an exemption of women from draft registration is inconsistent with efforts to "expand the utilization" of *volunteer* women in the military overlooks the fact that differences between the sexes are still a vital part of the fabric of our society and ignores cultural values with roots as deep as western civilization itself.

On July 19, 1980, Mr. Justice Brennan, noting the "sensitive context" in which the gender-based discrimination at issue in this case occurs, granted the Government's application for a stay pending appeal. Juris. St. 47a-52a.

REASONS TO GRANT INTERVENTION

I.

THE MOVANTS ADVOCATE FUNDAMENTAL SOCIETAL INTERESTS AND VALUES THAT THE GOVERNMENT HAS DECLINED TO PRESENT

The Movants are sixteen women between the ages of 18 and 26 who would be subject to registration and induction if the registration and induction provisions of the Selective Service System, 50 U.S.C. App. § 453, 454, were required by the Constitution to be gender-neutral.[3]

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[3]The pleading filed when the Movants sought to intervene in the District Court for the District of Columbia alleged the following:

(1) Stacy Acker is a female resident of Alabama and a citizen of the United States. She was born on September 7, 1960. Miss Acker hopes to marry and have children. Registration and potential induction into military service would hinder and disrupt these plans. Miss Acker believes that Congress properly exempted women from registration and compulsory military service because

[footnote continued]

They believe, for a variety of reasons with broad societal significance, that Congress acted properly in continuing

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women should not be conscripted during their best child-bearing years and because women who are mothers have a greater responsibility to care for their small children than to engage in military service.

(2) Christina Andres is a female resident of Florida and a citizen of the United States. She was born on November 28, 1960. Miss Andres does not want to serve in the Armed Forces because she is not prepared to be assigned to military combat. She believes that Congress properly exempted women from registration and compulsory military service because compulsory induction will necessarily lead to assignment to the battlefield, no matter what the job is labelled.

(3) Kathryn Barr is a female resident of Wisconsin and a citizen of the United States. She was born on May 9, 1960. Miss Barr has engaged in competitive sports and knows that she cannot compete successfully against males in any contest which requires upper-body strength. She believes that Congress properly exempted women from registration and compulsory military service because women are unable to match men in this important physical characteristic, which may be a matter of life or death in military combat.

(4) Almeda Cannon is a female resident of Tennessee and a citizen of the United States. She was born on January 27, 1962. Miss Cannon does not want to serve in the Armed Forces because she fears sexual abuse. She believes that Congress properly exempted women from registration and compulsory military service because of the great potential for sexual abuse if women were inducted, as described in Congressional hearings conducted last year.

(5) Elizabeth Cremers is a female resident of Illinois and a citizen of the United States. She was born on June 5, 1961. Miss Cremers does not want to serve in the Armed Forces because she does not want to be responsible for endangering men who serve with her, particularly in combat situations, who might instictively protect her while jeopardizing their military missions. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that, as a result of instinct and training, many male members of the Armed Forces would not be able to treat women as equals in military situations.

(6) Monica Dewit is a female resident of New Jersey and a citizen of the United States. She was born on June 4, 1962. Miss

[footnote continued]

the draft's exemption for women, and they desire that the exemption continue. The Movants believe that it

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Dewit does not want to serve in the Armed Forces because she fears that if she were ever captured by the enemy, she could not survive as a prisoner of war. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that if women were inducted into the military and were ever captured in actual conflict, they would be subject to much worse treatment than men.

(7) Mary Dolehide is a female resident of Illinois and a citizen of the United States. She was born on September 5, 1962. Miss Dolehide does not want to register and serve in the Armed Forces because she knows, from having heard the public testimony of Defense Department officials, that there are few practical restraints on the kinds of duties to which the Army may assign female inductees and because certain assignments, particularly those in combat zones, are tasks she cannot and will not perform. She believes that Congress properly exempted women from registration and compulsory military service because it knew that, if inducted, women might be deployed by the Army in combat zones.

(8) Esther Glucksman is a female resident of New York and a citizen of the United States. She was born on January 24, 1960. Miss Glucksman does not want to register and serve in the Armed Forces because she cannot participate in compulsory military service in any capacity, including alternative civilian service, without violating her religious principles, based on Orthodox Jewish law relating to modesty by women ("*tznius*"), as authoritatively prescribed by rabbinic decision. She believes that Congress properly exempted women from registration and compulsory military service because it knew that many women in the United States have religious scruples against compulsory service relating particularly to their status as women.

(9) Anna Harrington is a female resident of Virginia and a citizen of the United States. She was born on June 12, 1962. Miss Harrington does not want to serve in the Armed Forces because she believes that combat and other tasks performed by those in military service are, by tradition and by actual performance, more capably done by men than by women. She knows that she cannot engage in actual combat with enemy male troops, and she believes that women in military service will endanger not only their own lives but those of other soldiers. Miss Harrington

[footnote continued]

is imperative that this Court not determine the constitutionality of an all-male Selective Service System

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believes that Congress properly exempted women from registration and compulsory military service because it recognized that men can fight and do military jobs better than women.

(10) Laura Headlee is a female resident of Michigan and a citizen of the United States. She was born on March 13, 1961. Miss Headlee does not want to register and serve in the Armed Forces because doing so would conflict with her beliefs, based upon her upbringing and religious background, that men are responsible for protecting the country and women are responsible for maintaining the home and caring for the family. She believes that Congress properly exempted women from registration and compulsory military service because it knew that many women in the United States would find military service, in any capacity, to be an infringement upon their rights of conscience and free exercise of religion.

(11) Corliss Jarrett is a female resident of Tennessee and a citizen of the United States. She was born on February 11, 1962. Miss Jarrett is the mother of a baby, and she has no husband. She does not want to serve in the Armed Forces because she will not be able adequately to care for her child while she is in military service. Miss Jarrett believes that Congress properly exempted women from registration and compulsory military service because it recognized that single mothers of small children are more greatly needed to care for their children than are single fathers, and that even the uncertainty of possible induction would disrupt the upbringing of these children.

(12) Karen Johnson is a female resident of Tennessee and a citizen of the United States. She was born on October 21, 1960. Miss Johnson does not want to serve in the Armed Forces because her right of privacy would be violated in military life, which is governed by male culture, and which accepts body contact, foul language, and personally offensive remarks which she, as a lady, finds obnoxious. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that involuntary induction into the Armed Forces would subject many women in the United States to invasions of privacy and mental suffering relating directly to their identity and self-image as females.

(13) Pam Patrick is a female resident of North Carolina and a citizen of the United States. She was born on April 4, 1961. Miss

[footnote continued]

without full presentation and consideration of the reasons, including sociological, psychological and reli-

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Patrick does not want to serve in the Armed Forces because her upbringing as a Christian woman has taught her that women should produce life, not destroy it. She believes that she cannot be trained to kill, even if she were never actually assigned to combat duty. She also fears physical injury which might result from training or combat. Miss Patrick believes that Congress properly exempted women from registration and compulsory military service because it recognized that many women in the United States would be unable, by reason of their upbringing as women and their feminine self-image, to participate in any way in a governmental function dedicated to the destruction of human life, and that physical disfiguration would be much more devastating to women than to men.

(14) Felicity Smith is a female resident of Missouri and a citizen of the United States. She was born on January 30, 1960. Miss Smith does not want to serve in the Armed Forces because she would find intolerable the lack of privacy in daily military life, particularly the dressing, bathing, toilet and sleeping facilities. These aspects of military life are contrary to her nature as a woman and to the personal behavior and habits which are part of her feminine nature. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that many women in the United States would be unable to accept the military's infringements on privacy which would conflict with values with which they were raised.

(15) Kathleen Sullivan is a female resident of Illinois and a citizen of the United States. She was born on May 8, 1958. Miss Sullivan is engaged to be married to a man who has completed his military service. Her prospective husband would, therefore, not be subject to induction. The possibility that Miss Sullivan would be subject to involuntary induction would have a drastic effect on the prospective family's plans to have children. Miss Sullivan believes that Congress properly exempted women from registration and compulsory military service because even the possibility of involuntary induction of women would seriously affect the personal family decisions of many married couples.

(16) Agnes Zepeda is a female resident of Washington and a citizen of the United States. She was born on October 5, 1959. She does not want to serve in the Armed Forces because she

[footnote continued]

gious grounds, why millions of women oppose compulsory service in the Armed Forces. It is evident from both the Government's position below and its Jurisdictional Statement in this Court that the Government does not intend to press the interests Movants represent or the considerations Movants wish to present to this Court. These considerations apply exclusively to women and warrant the legislative exemption now granted them from registration and induction into the Armed Forces. In a case of this magnitude, where "[t]he importance of the question and substantiality of the constitutional issues are beyond cavil" (Juris. St. 50a; Mr. Justice Brennan, in chambers), Movants should be permitted to intervene to urge the important interests they represent in a fully adversarial manner.

Movants did not previously attempt to intervene in this case because neither they nor their counsel were aware of it until after the highly publicized case of *Barnett v. Rostker,* No. 80-1578, was filed in the District Court for the District of Columbia on June 26, 1980. By that time, this case had been fully briefed, and was scheduled shortly to be argued and decided by the District Court, thus rendering any meaningful intervention below in this case impossible.[4] However, recognizing

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knows, from having grown up with brothers in the family, that she is unable to equal men in performing tasks which require physical strength and agility, and she does not want the national defense to depend on her ability to perform physically taxing jobs. She believes that Congress properly exempted women from registration and compulsory military service because Congress knows that most tasks to be performed in military service could be done better by men than by women.

[4]Given the procedural history of this case, it is understandable why it was unpublicized and unknown to Movants and their

[footnote continued]

that they had very substantial interests in the outcome of litigation challenging the constitutionality of an all-male registration and induction program, Movants moved to intervene in the *Barnett* case several days after it was filed. After the decision below in this case and the Government's appeal to this Court, the District Court in *Barnett* stayed proceedings in that case without ruling on Movants' motion to intervene. Thus, although Movants have diligently tried to protect their interests in the exemption under challenge here, they will be denied a meaningful opportunity to do so unless this Court allows them to interevene now.

Moreover, the Movants' interests are ones which the Government—the sole appellant—has clearly indicated it will not urge before this Court. The Government is concerned principally with the effective administration of the Armed Forces and not with the sociological, psychological or religious consequences to millions of women in the United States of a precedent-breaking law that would subject women to military conscription. Thus, the Government's Jurisdictional Statement, consistent with its position below, stresses the Government's interest in an efficient mechanism for induction into, and the combat-readiness of, the Armed Forces. The

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counsel until after the filing of *Barnett*. The complaint in this case was filed in 1971, and all of the litigation in the case, except that immediately preceding the decision now before this Court, occurred prior to July 1, 1974. During this period, all-male conscription was repeatedly upheld in the face of Equal Protection challenges similar to the one at issue in this case. *See, e.g., United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975); *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074 (1072). The case remained so dormant after 1974 that, in June 1979, the District Court proposed to dismiss the case for failure to prosecute it.

Movants, on the other hand, are concerned with the detrimental effects on the women of this country that subjecting them to draft registration and induction might have.[5]

II.

THE GOVERNMENT, WHICH IS THE SOLE APPELLANT, IS NOT TOTALLY ADVERSE TO THE APPELLEES' POSITION

In light of the Executive Branch's previous opposition to an all-male draft, it can hardly be said that the Government's interests are fully adverse to those of the appellees. The responsible officials of the Executive Branch, including even the President and the primary named defendant in this case, have publicly disagreed with Congress' judgment that women should be exempt from the draft. The knowledge of the court below of the public pronouncements of the President and his subordinate Executive Branch officials undoubtedly played a large role in its decision. Indeed, the views of the Executive Branch are cited throughout the opinion below. *See* Juris. St. pp. 21a-22a, n.13; pp. 28a-30a, nn.18, 19; p. 31a; pp. 33a-38a, nn.25-28. Given the role of Executive Branch opinion in prompting the District Court's conclusion that Congress was "inconsistent" in encouraging the recruitment of women for the Armed Forces while exempting women from compulsory military service, a fully adversarial presentation of the case for excluding women from the draft requires the

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[5]The fact that women have been *voluntarily* serving the Armed Forces does not undercut Movants' position. Movants believe that women who want to serve in the military should be permitted to do so, but that women as a class are entitled to be exempt from *compulsory* military service.

intervention of interested parties other than the Justice Department.

The Movants are particularly well-suited for this role. Their personal interest in this case is virtually a mirror-image of the interest of the appellees. The appellees brought this action because they believe that Sections 3 and 4 of the Military Selective Service Act unconstitutionally require them to register and submit for induction while it exempts similarly situated females. The Movants typify the similarly situated females who are exempt, and who, if appellees prevail, will necessarily become subject to the same burdens that the appellees challenge.[6]

Although intervention in this Court is not common, there is ample precedent to support it. *See, e.g., Hunter v. Ohio ex rel. Miller,* 396 U.S. 879 (1969); *Banks v. Chicago Grain Trimmers Association, Inc.,* 389 U.S. 813 (1967), *decision on the merits,* 390 U.S. 459 (1968); *NLRB v. Acme Industrial Co.,* 384 U.S. 925 (1966), *decision on the merits,* 385 U.S. 432 (1967). Indeed, in *Eastern-Central Motor Carriers Association v. United States,* 321 U.S. 194 (1944), the Court permitted intervention in a situation analogous to that presented here. *Eastern-Central* involved an appeal from the decision of a three-judge district court sustaining an ICC decision rejecting certain rate schedules proposed by Eastern-

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[6]It is no answer to say that if the all-male draft is held unconstitutional, Congress could decide to have no draft at all, thereby relieving both sexes of this burden. Our national history has convincingly demonstrated that, even if only for times of actual conflict, a draft law is a necessity. Thus, an invariable consequence of a decision for the appellees would be to subject the Movants to the draft.

Central. The Court allowed the National Industrial Traffic League, a group whose members would be affected by the outcome of the rate proceedings, to intervene on appeal despite the fact that the League, "not having notice of the proceedings there until after the argument there," did not appear in the District Court. 321 U.S. at 198 n.5. So, too, the Movants here, having a direct and substantial interest in the outcome of this suit but unable to intervene in a timely manner below, should be permitted to intervene here.

The filing of an *amicus curiae* brief is not an adequate substitute for intervention. Appearance as of right—both by briefs and by oral argument—is a significant element in the actuality and appearance of justice. And it is important, in a case that so vitally affects the lives of millions of women in the United States, that their position be heard orally, as well as in briefs, with the full dignity and right of a party.

III.

THE LEGISLATIVE HISTORY DEMONSTRATES THAT THE CONCERNS REPRESENTED BY THE MOVANTS, WHICH THE GOVERNMENT WILL NOT URGE, WERE IMPORTANT TO THE CONGRESS

The District Court failed to take into account the overwhelming and unacceptable impact on this country's women of *compelling* them to participate in military conscription and the undesirable effects such a gender-neutral draft would have on our national resolve. It improperly analyzed the constitutionality of the all-male draft in isolation from the social context in which any system of military conscription must take place.

The District Court's perception of this case contrasts sharply with the considered judgment of Congress that

> there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the Committee finds compelling, witnesses representing a variety of groups testified before the Subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The Committee is strongly of the view that such a result, which would occur if women were registered and inducted under the Administration plan, is unwise and unacceptable to a large majority of our people.

Report of the Senate Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, 5 (April 22, 1980) (R. 878). Indeed, it was Congress' belief that, in the words of Senator Heflin, "the opposition to registering women is so widespread and pervasive that if young women were required to register, it might jeopardize the whole registration program." 126 *Cong. Rec.,* S. 1242 (Feb. 7, 1980). Such assessments of the broad social impact of a decision to draft women are within the unique province of Congress to make and are not for the courts to ignore, especially where, as here, questions of our national defense and Congress' power under Article I, § 8 are concerned. *Schlesinger v. Ballard,* 419 U.S. 498, 510 (1975); *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

Moreover, the disruptive society-wide impact that Congress perceived would flow from a decision to subject women to compulsory military service illuminates a second reason why the court below erred. Unlike the statutes at issue in such cases as *Wengler v. Druggists Mutual Insurance Co.*, 100 S. Ct. 1540 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), the challenged provisions of the Military Selective Service Act do not "employ gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Congress has chosen to exempt women from compulsory military service not because it views sex as a rough measure of the ability of a given individual to perform a specific job in the military, but because in this particular area the different sexes should be treated differently. The consequences of ignoring differences based upon gender and forcing unwilling women into military service are, in Congress' view, unacceptable to the country as a whole.

Congress' decision not to compel women to submit to military registration and induction was not premised on outmoded and constitutionally suspect notions of the "proper" economic role of women in our society. This is absolutely clear from the fact that Congress has increasingly encouraged women to *volunteer* for military service. *See, e.g.*, 14 U.S.C. § 182(a) (1976) (opening the military service academies to women). Instead, Congress concluded that while women should be afforded opportunities for freely-chosen employment or a career in the military, women should not, because of values and mores at the very root of our culture, be *forced* to join the military. As expressed by Representative Neal (126 *Cong. Rec.*, H. 293 [Jan. 28, 1980]):

> I would in no way deny women the opportunity to serve in [non-combat] roles.

> But . . . to make women serve involuntarily is quite a different matter. It opposes not only the traditions of the United States of America, but is contrary to the experience of the entire Western World—indeed, with few exceptions, the experience of civilized humankind.

CONCLUSION

For the foregoing reasons, the Movants should be granted leave to intervene as appellants if probable jurisdiction is noted.

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No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY MEMORANDUM FOR APPELLANT

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The question presented is whether the gender-restricted registration enacted by Congress passes constitutional muster, in light of the paramount importance of the governmental interest—preparedness to respond to a national emergency—and the appropriateness of the statutory classification to further that end by supplying combat-capable inductees to meet military personnel needs in such a situation. Appellees cloud the issue by losing sight of the specific purpose served by draft registration, by erroneous factual assertions, and by a wholly inappropriate

reassessment of what personnel the armed services can and should make use of in the event of a national emergency.

1. Appellees argue that women have been shown to handle necessary and important responsibilities in the volunteer forces generally. They reason, from that proposition, that supplying the military with more women—in addition to male conscriptees—could only enhance, rather than hinder, defense flexibility. But these arguments ignore the particular purpose met by the draft registration provisions of the Military Selective Service Act, and lose sight of the principle that the reasonableness of a classification drawn by a statute must be considered in light of the purpose of that statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964).

Like the district court, appellees consider registration in a vacuum.[1] The fact is, however, that Con-

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[1] Appellees contend that the constitutionality of the male-only registration must stand or fall solely on the basis of the reasons articulated by Congress when it enacted the Military Selective Service Act in its "modern form" in 1948, and they argue that the reasons and conclusions expressed in the Report of the Senate Armed Services Committee in 1980) S. Rep. No. 96-826, 96th Cong., 2d Sess. 154-164 (1980)), must be dismissed as afterthought which played no actual part in enactment of the exclusionary registration (Motion to Affirm 4, 36-37). This reasoning is unpersuasive. First, the classification at issue is properly judged under the "rational relationship" test, and may thus be sustained on the basis of any set of factors that might reasonably have been conceived by Congress in its support. See *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1979). At all events, the policies and findings articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were issued as part of a comprehensive reexamination of the draft and registration questions in

gress tied the question of who should be registered to the question of who might ultimately be inducted because the sole function of a premobilization registration is to establish a mechanism "for early delivery of inductees in an emergency." S. Rep. No. 96-826, 96th Cong., 2d Sess. 156 (1980).[2] In outlining the basis for its decision to exclude women, the Senate Armed Services Committee emphasized that the purpose of a draft is to supplement the volunteer forces with "combat manpower" in the event of an emergency, that is "the primary need [would be] for combat replacements from the induction system." S. Rep. No. 96-826, *supra*, at 154, 158.[3] At present, women

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view of current military needs, and followed lengthy hearings on the President's proposal to amend the Act and expand draft registration. These findings culminated in the current defense appropriations bill, H.R. 6974, which rejected the President's proposal and which limited appropriations to the amount necessary to register males. It thus essentially constitutes reconsideration and reenactment of the gender-restricted draft registration.

[2] See *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1670 (comments of Assistant Secretary of Defense Danzig) ("The purpose of registration is to equip us with information so that if we had a national mobilization, we could move more quickly to achieve our wartime personnel requirements * * *"), 1674 (comments of Sen. Warner) (those registered should be those who would, if necessary, be drafted) (1980); Statements in Deposition of Bernard D. Rostker, Director, Selective Service (R. 1359, 1400).

[3] See, *e.g.*, *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 24, 54 (statements of General Rogers), 56 (statement of Sen.

are prohibited by statute and military policy from engaging in combat—a prohibition not challenged here —and Congress simply concluded that including women in the draft pool would not advance the purpose behind registration.

In excluding women in view of the combat restrictions, Congress acted on the eminently reasonable assumption that it was unnecessary to amend a statute intended solely to fulfill emergency military needs in a manner that would not serve those needs. Appellees counter by suggesting that the Senate Committee fabricated its findings as to military requirements, and they assert that the record before Congress uniformly established a military need to induct women. Motion to Affirm 9-12, 44-45. This ignores the testimony of the non-civilian component of the Defense establishment, the members of the Joint Chiefs of Staff. The burden of that testimony was that, although a certain number of female inductees could be accommodated to satisfy concerns of equity,[4] the drafting of females in place of males would, at best, fail positively to serve emergency defense needs and, at worst, hinder military effectiveness by impairing flexibility. General Rogers, Chief of Staff of the Army—the Service which would receive the greatest influx of those called in a draft—was "not prepared to agree that they [women] should be drafted

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Cohen) (1979); *Hearings on S. 2294, supra,* at 1688 (statement of Sen. Jepsen) ("[T]he shortage would be in the combat arms. That is why you have drafts").

[4] Even under the most favorable statistics appellees can find, the Armed Services could not absorb more than 80,000 women out of a theoretical pool of 650,000 inductees (the total number called for under the model emergency scenario used by the Armed Services in formulating its registration projection).

as of today" given the Army's consistent success at "filling our recruiting objectives for female soldiers." *Hearings on S. 109 and S. 226, supra,* at 14. That view was echoed by the other service chiefs as well. See, *e.g., id.* at 15 (statement of Admiral Hayworth).[5]

Appellees alternatively challenge the Senate Committee's findings by asserting "[t]here is no reason to believe" that the military would not need to induct women "in time of war" (Motion to Affirm 12). But the testimony of the Chiefs of Staff was based pre-

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[5] Attempting to rewrite the book on military need, appellees assert that "[a]ctually * * * the Army was experiencing a twenty-five percent shortfall in female recruitment in fiscal year 1979" (Motion to Affirm 10 n.17). Appellees' proffer—focusing on testimony offered before the close of the fiscal year—is misleading. It contradicts the general thrust of the testimony concerning the abundance of female volunteers, and ignores current Pentagon statistics, which showed that every service but the Army fully met or exceeded female recruitment needs in fiscal 1980, and that the Army met 95% of its quota. *Military Manpower Strength Assessment, Recruiting and Reenlistment Results for Fiscal Year 1980* (Oct. 31, 1980). General Allen, Chief of the Air Force, advised the Senate Subcommittee that an increase in females compared with males was predicted for the recruitment market. *Hearings on S. 109 and S. 226, supra,* at 48. See also *id.* at 45 (statement of Navy Chief of Staff Admiral Hayward) ("We cannot absorb more women any faster than we are absorbing them * * *"). Appellees also suggest a critical need for combat-barred support personnel. Even putting aside the military's need to reach into non-combat units for personnel rotation purposes, it is worth noting Marine Corps Chief of Staff, General Wilson's testimony in this regard: "[F]rom a combat point of view, the use of women is now against the law. But combat is a relative thing. I have defined combat in such a way that women will not be assigned closer to the front than the division or wing headquarters." *Id.* at 15.

cisely on draft needs projected for "time of war." As Admiral Hayward put it: "To sum up, there would not be a requirement for women to be drafted at all to meet our wartime needs, in my judgment. I think the volunteers would take care of it." *Hearings on S. 109 and S. 226, supra,* at 15. See *id.* at 56 (statement of Sen. Cohen), 72 (statement of Admiral Hayward). See also note 5, *supra.*

Appellees direct their factual rebuttal principally at the Senate Subcommittee's rationale that registering women would impair military flexibility, and they strenuously assert that an expansion of the registration pool can only enhance military flexibility. Here, again, they reject the congressional determination that the sole purpose of registration is to facilitate induction. Significantly, to the extent appellees do recognize that registration is a mechanism for induction, they refuse to evaluate the concept of military flexibility within the relevant context of an emergency draft. As General Rogers explained (*Hearings on S. 109 and S. 226, supra,* at 16):

> One thing which is often lost sight of, Senator [Nunn], is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks * * *.
>
> * * * * *
>
> Now, if that support base and that operating base to the rear consist in large measure of women, then we do not have that opportunity * * *.

Thus, while "women plus men" might appear to enhance flexibility on an abstract registration roll, the substitution of women for men within a finite pool of inductees subject to emergency deployment has the opposite result.

Similarly, appellees would apparently write off any delays stemming from the armed services' inability to deploy 100% of the finite number of inducted trainees to combat zones. But, while the avoidance of such delay might be viewed as a constitutionally insubstantial matter of administrative convenience in another context, it is compelling when the concern is to assure a prompt military response to national emergency. As Admiral Hayward explained (*Hearings on S. 109 and S. 226, supra*, at 72):

> The national strategy for conventional conflict is heavily dependent on mobilization and deployment rates.
>
> Timeliness of mobilization and deployment, and our ability to sustain the flow of manpower and material to the theater of conflict, are factors critical to the success of the strategy.
>
> Any liability of the Selective Service System to ensure the timely flow of forces to the war places the outcome of our strategy in serious question, and our national security in jeopardy.

Finally, the loss of flexibility that could stem from devoting limited training facilities to non-combat capable female inductees could also have a critical impact in time of war. In this regard, General Wilson advised the Committee that the Marine Corps' war efforts would be more constrained by limitations in "training capacity" than by personnel shortages. *Id.* at 73. General Rogers similarly explained that "[i]t is necessary to plan to keep the military training establishments filled to capacity in any situation requiring full mobilization." *Ibid.*

In sum, the only purpose of registration is to permit a speedy and efficient draft. The military needs served by, and the military flexibility derived from, a registration pool must therefore be evaluated

strictly in light of the roles that registrants would be called to serve as emergency inductees. Congress deemed it inadvisable to provide for the induction of women because of the failure of such a draft to further the military's overriding need for combat-capable personnel, combined with the potential harm that could ensue from complicating the induction system to accommodate equity rather than strict military necessity. This approach was not only rational, but closely fitted to the purpose of the Act.

2. The foregoing discussion not only establishes that the gender distinction drawn by the Military Selective Service Act survives heightened scrutiny under the test of *Craig* v. *Boren*, 429 U.S. 190 (1976); it also serves to illustrate the impropriety of applying that test to the extent that it does involve a substantive evaluation of military personnel needs. It is a hazardous enterprise for the courts to re-evaluate decision-making by a coordinate branch in this area. *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931). See *Brown* v. *Glines*, 444 U.S. 348, 360 (1980); *Gilligan* v. *Morgan*, 413 U.S. 1, 8 (1973); *Orloff* v. *Willoughby*, 345 U.S. 83, 91-92 (1953); *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (5th Cir.), cert. denied, 348 U.S. 856 (1954). Appellees would disregard the precedents requiring deferential review of military and defense-related actions almost entirely on the ground that "registration * * * is imposed only on civilians" (Motion to Affirm 32-33). This response is of a kind with the argument that voting discrimination presents only a "political question," and it merits the same short treatment as "little more than a play upon words." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

What is more, the "rational basis" standard is appropriate in the present context because men and

women are not "similarly situated" in view of the combat restrictions. *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). The statutory classification is not a derivative of gender *per se*, but rather neutrally excludes persons presently ineligible for combat duty.[6] Cf. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy benefits from state disability system is not based on gender *per se*, but on the condition of pregnancy, and is reviewed under a rational relationship test). The combat exclusion itself is not claimed by appellees to be based on false stereotypes, nor is it immutable. If and when combat restrictions are removed, an amendment in the registration provisions of the Act can follow. In the meanwhile,

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[6] Appellees argue that all men, however unfit, but no women "however fit to serve, are compelled to register for potential conscription into the Armed Forces" (Motion to Affirm 19, 46). But, of course, those men who are ineligible for combat assignment—including not only the "halt" and the "blind," but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus equally excused from "conscription into the Armed Forces." *Id.* at 19. Ideally, one would excuse all those unfit for combat from registration as well. But that is not practical. Classification has been deferred until after the issuance of induction notices because, at least in some cases, the physical and mental conditions of registrants are subject to change, and the evidence demonstrated that it is most efficient to presume all males combat-capable until classification. See *Presidential Recommendations for Selective Service Reform: A Report to Congress Prepared Pursuant to P.L. 96-107* (Feb. 11, 1980) (R. 216-218). On the other hand, since every woman is precluded by law and policy from combat assignment, it would have made no sense for Congress to require women's registration in the first place.

"as long as the military Services are permitted to continue to take volunteers after a declared M[mobilization]-day, no man or woman would be denied the opportunity to serve their country." *Hearings on S. 109 and S. 226, supra*, at 16 (statement of General Allen).

For the reasons stated here and in our jurisdictional statement, probable jurisdiction should be noted, or the judgment below should be summarily reversed.

Respectfully submitted.

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No. 80-251

SEP 80

MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLEES IN OPPOSITION TO MOTION TO INTERVENE OF STACEY ACKER, ET AL.

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BRIEF OF APPELLEES IN OPPOSITION TO MOTION TO INTERVENE OF STACEY ACKER, ET AL.

INTRODUCTION

Appellees herein oppose intervention by Stacey Acker, et al.[1] This is not one of the rare instances in which those who have sat as observers in the lower courts should be permitted to appear in the Supreme Court of the United States "with the full dignity and right of a party." (Motion to Intervene, 15).

The proposed belated intervention would bring no new judicially cognizable interest or position before the Court. No choate interest of Proposed Intervenors is at stake in the judgment at bar, and no such interest will be sacrificed whatever its outcome. They would instead argue for the primary of expediency and popularity over the principle of equal justice. That argument would be made from factual contentions outside of the record, and as to which there has been neither investigation nor discovery. Intervention should be denied because the delay in seeking it is inexcusable and prejudicial to Appellees, and because to permit the intervention would be to transform the proceedings in this Court into a trial of nebulous issues of socio-psychology.

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1. The sixteen movants are referred to jointly hereinafter as "Proposed Intervenors." They are women, ages 18 through 26, who seek to intervene for the first time in this Court. They would present their "sociological, psychological and religious" views in opposition to the registration of women for possible conscription. They contend that the purported unpopularity of a gender-neutral registration should be heard in this Court as constitutional justification for the present statutory discrimination which the court below held to violate the Due Process and Equal Protection guarantees of the Fifth Amendment. (Motion to Intervene, 10-11, 15-18)

COUNTERSTATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case presents the question of the constitutionality of legislation which discriminates on the basis of gender in the registration of persons for possible compulsory military service. In its Memorandum Opinion of July 18, 1980, the District Court held that:

> "the complete exclusion of women from the pool of registrants does not serve 'important governmental objectives' and is not 'substantially related' . . .to any alleged governmental interest. Thus, the MSSA[2] unconstitutionally discriminates between males and females." (Jurisdictional Statement, 43a).

That opinion followed the trial of a case which was filed in 1971 and which was publicized by three (3) reported decisions,[3] numerous news articles[4] and Congressional hearings. The decision itself reflects a careful and critical analysis of a record of more than two thousand (2,000) pages, treating all of the factual issues framed by the parties prior to trial. Defendants' alleged justifications for male-only registration, the contentions towards which virtually all of plaintiffs' discovery and trial evidence were directed, were provided in response to interrogatories requesting a statement of the alleged justifications, governmental interests, and the relationship of sex-discrimination to the MSSA: "The Selective Services Act reflects the manpower requirements of the military services by pro-

2. Military Selective Service Act, 50 U. S. C. App. §§ 451, et seq.

3. 480 F. 2d 545 (3d Cir. 1973); 378 F. Supp. 766 (E. D. Pa. 1974); 342 F. Supp. 339 (E. D. Pa. 1972).

4. See: *e.g.*, Appendix "A"; Revised Joint Documentary and Stipulated Record, 963, 1040-1045 (R. 963, 1040-1045).

viding for a system of conscription which makes males available for military assignment to combat and combat support activities in times of national emergency and armed hostilities abroad." (Defendants' Supplemental Answers and Objections to Plaintiffs' Interrogatories to Defendants (Set No. 1—Supplementary) (Responses 1 through 3))

The trial court permitted intervention by additional plaintiffs even after the case was set for trial (Jurisdictional Statement, 2a), and considered additional interventions as late as July 1, 1980, the actual day of trial. Even at that late date, intervention or joinder by additional plaintiffs was denied only after the Court granted the class action motion, so that the interests and factual situations of all proposed intervenors were before the Court. (Jurisdictional Statement, 2a-3a).

The Order of July 18 was appealed from on the same day it was entered. On September 16, 1980 the Proposed Intervenors filed their instant Motion to Intervene.

REASONS FOR THE DENIAL OF INTERVENTION

I. Proposed Intervenors Have Made No Showing of Exceptional Circumstances Which Would Justify Intervention in This Court.

Where intervention in this Court is at issue it is long settled law that:

> "[N]o one but an appellant . . . can be heard for the reversal of a decision in the subordinate court." *The Wm. Bagley v. United States,* 72 U. S. 583, 591 (1867).

The same general rule applies today:

> "intervention at the Supreme Court level is a remedy seldom invoked and rarely granted. In most situations, one must have intervened below, or at least sought to intervene below, in order to have any kind of standing to petition for certiorari."

Stern and Gressman, *Supreme Court Practice,* § 6.17 at 436 436 (5th ed. 1978). Indeed, Proposed Intervenors have cited no case which presents a situation even remotely analogous to the case at bar. In *Eastern-Central Motor Carriers Ass'n v. United States,* 321 U. S. 194 (1944), intervenors in the Supreme Court had appeared before the Interstate Commerce Commission where the factual record was made.[5] The other cases cited by Proposed Intervenors as examples of intervention in the Supreme Court, *Hunter v. Ohio ex rel. Miller,* 396 U. S. 879 (1979); *Banks v. Chicago Grain Trimmers Ass'n., Inc.,* 389 U. S. 813 (1967); *NLRB v. Acme Industrial Co.,* 384 U. S. 925 (1966),

5. 321 U. S., at 198-99.

offer no support for intervention in this case. For example, in *Banks,* suit was brought in the district court by a deceased man's employer, seeking to set aside an order of the Department of Labor ("DOL") granting compensation death benefits to the widow and children. 369 F. 2d 344, 346-47 (7th Cir. 1966). The widow, who had filed the original claim for benefits with the DOL, was not a party to the district or appellate court proceedings (DOL was supporting her position), but was allowed to intervene at the Supreme Court level *for the purpose of filing a Petition for Certiorari,* in order to protect her award *where none of the other parties sought review. Certiorari* was granted and she, not DOL, was the party. See 12 *Moore's Federal Practice* ¶ 434.01 (1980).

In *Hunter,* a judicial candidate whose name had been stricken from the ballot in an original action in the Ohio Supreme Court brought against the county board of elections *and in which he was denied intervention* was permitted to intervene and petition for *certiorari* in the Supreme Court when the board, which had represented his interest below, did not seek review. Reply Brief of Respondent Stark County Board of Elections, 3-9, *reprinted* in Stern and Gressman, at 1056-61. *NLRB v. Acme Industrial Co.* permitted a labor union to intervene in this Court's on the heels of *International Union UAW, Local 238 v. Scofield,* 382 U. S. 205 (1965), overturning prior law in the Seventh Circuit which had barred participation by unions in NLRB enforcement actions where the union had prevailed before the agency. Intervention in this Court has been limited to persons who participated or *could* not participate below.

II. There Are Substantial Reasons for Denial of Intervention Here.

A. The Proposed Intervention Is Inexcusably Late.

Proposed Intervenors would excuse their delay in seeking to participate in this case prior to September 16, 1980 by claiming ignorance of the case until after June 26, 1980 (Motion to Intervene, 11). Such ignorance was the result of the studied inattention of Proposed Intervenors. In addition to the prior reported decisions noted at footnote 3, in its Order of October 24, 1975 denying defendants' motion for summary judgment the district court's instructions to the parties were to "proceed with discovery in this matter so that a full record can be presented to the court before a final decision is made on the merits of this case." The docket sheet since 1975 reflects the ongoing discovery and motion practice in the case. Whenever Proposed Intervenors awoke to their interest in the issue of male-only registration for conscription, ascertaining the status of this case, which was quite active according to the reported opinions, would have required no more than a telephone call to the Clerk of the District Court or to counsel. Indeed, pretrial hearings on defendants' final motion for judgment in the case continued as late as December, 1979, with an opinion on February 19, 1980 denying the motion and setting the case for trial. Discovery actually continued until the very eve of trial. Quite contrary to the misdescription of the proceedings at Motion to Intervene, 11, trial briefs and post-trial submissions were accepted at all times prior to the Order of July 18, 1980.

Nor is Proposed Intervenors' claim that this case was dormant tenable according to the very public Congressional Hearings relied upon by both Appellant and Proposed Intervenors in the search for a justification for

male-only registration. When Deputy Assistant Attorney General Lawrence Sims appeared twice in open hearing before Congress in March, 1980, he took the opportunity to ask that Congress provide new, *post hoc* statutory history with which to defend the MSSA at *the trial of this case*: [6]

> "Mr. Simms (sic): . . . Before doing so, I would like to note that that is a matter that is currently in litigation before a three judge Federal Court in Philadeldelphia, the specific issue of the constitutionality of an all male draft. (R1042)
>
> * * *
>
> "The issue is now back before Congress, and *speaking solely for the Department of Justice as litigator, it should be fairly obvious to this committee that the defensibility of the all male draft is something which Congress perhaps should speak out clearly and formulate the kind of record if, indeed, it chooses to reject the Administration's proposal, which will be helpful rather than hurtful in the litigation.*" (R1045) (emphasis supplied).

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6. The responses of legislators sympathetic to this plea form the crux of the "case" presented by both Appellant and the Proposed Intervenors. E.g., Jurisdictional Statement, 13-15; Motion to Intervene, 15-18.

> "First, in that litigation it is before a three-judge court. The Court of Appeals for the Third Circuit several years ago determined that this issue presented a substantial constitutional question. It was necessary in order to give the three-judge court its statutory jurisdiction that that determination be made. The issue had never been decided by the Supreme Court of the United States on the merits, so we are in an area where we have to raise it solely by analogy to recent and prior somewhat older Supreme Court cases in this area as well as a fair amount of law made in lower federal courts." (R1042-1043)

"Senator Nunn. Just a couple of other questions and then a brief observation.

"Mr. Sims, we are going to have a legal hearing on this where you are going to testify, and we can get into this later at that time. But the challenge to excluding women could conceivably come from a male who has felt that his odds of registration went up if women were excluded. Is that correct?

"Mr. Sims. Yes, sir. In fact that is the nature of the present challenge we are dealing with before a three-judge court up in Philadelphia." (R963)

Finally, when the case of *Barnett v. Rostker*, No. 80-1578 in the District Court for the District of Columbia, was filed, plaintiffs therein noted and the press duly reported throughout the nation that the instant action was about to come to trial in Philadelphia. (Appendix "A") Yet, Proposed Intervenors did nothing in this case until Sept. 16, and even waited until July 15 to seek to intervene in *Barnett*.

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6. (Cont'd.)

"In our analysis you will note that in support of the constitutionality of the all male draft we do not call on in any way the legislative history or reasoning of the Congress which in 1949 adopted the law which the Administration is presently urging be changed. The reason for that is very simple. In virtually all of the lower court cases which have reached a judgment on this issue, the legislative history of the 1949 Act has been totally unhelpful to government in defending its constitutionality.

"The reason for that is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature." (R1044-1045)

The Proposed Intervenors delayed, first by inadvertence and then by design, until discovery closed, the record closed, trial was held, judgment entered and the case was pending in the Supreme Court before seeking any participation of any kind in the case. There is no excuse for such tardiness.

B. Intervention Would Be Disruptive and Unfair to Appellees and to the Court.

Proposed Intervenors concluded that, and they did not seek to intervene below before trial because, "meaningful intervention" was "impossible" (Motion to Intervene, 11). At this even later stage, intervention would be even less meaningful, and would be prejudicial to Appellees and disruptive to the appellate process.

To the extent that Proposed Intervenors wish to argue for a less rigorous standard by which to judge male-only registration or that there are considerations of military policy and management which necessitate the total exclusion of all women from the pool of persons upon whom the nation *could* call in a crisis, those arguments have been made and are being made in this litigation by Appellant, represented by the Department of Justice and the Solicitor General. It is the United States, by the Department of Justice, to which Congress and the courts have assigned the task of defending the constitutionality of Congressional statutes. 28 U. S. C. § 2403(a); Rule 28.4(b), Rules of the Supreme Court. The defense of policies embodied in statutes is the particular concern of the Government. Intervention by private parties where the Government is actively defending a statute or policy is expressly disfavored. *Commonwealth of Pa. v. Rizzo*, 530 F. 2d 501, 505 (3rd Cir.), *cert. denied* 426 U. S. 921 (1976); 7A *Wright & Miller*, Federal Practice and Procedure § 1909; at 528, 532.

Moreover, it is towards those issues that the record at trial was made, and it is the trial record which is considered on appeal. *Richardson v. Blanton,* 597 F. 2d 1078, 1079 (6th Cir. 1979); *Hill v. Trustees of Indiana University,* 537 F. 2d 248, 251, n. 2 (7th Cir. 1976); *Stearns v. Hertz Corp.,* 326 F. 2d 405, 408 (8th Cir.), *cert. denied,* 3774 U. S. 934 (1964). Thus, to the extent that Proposed Intervenors wish to argue anything truly different from Appellant,[7] the tardiness of the intervention would force consideration of new issues on a record made without those issues in mind, or transform this Court into a trial court on appeal.

C. The Arguments of the Individual Proposed Intervenors Are Not Material to This Case.

The Motion to Intervene itemizes the factual and philosophical reasons why each of the Proposed Intervenors wishes to remain exempt from registration for possible conscription (Motion to Intervene, n. 3). Most of the reasons given by the individual Proposed Intervenors are just that, individual reasons why this or that female might want herself exempted.[8] Those reasons accurately reflect the personal feelings and beliefs of millions of young *males* who also wish that they did not have to register. However, individual situations and beliefs would be best accounted for by a rational system of nondiscriminatory deferments or exemptions from induction or from military or combat service. Excluding all women from service because some women would find Army life offensive makes no more sense than excluding all males for the same reason.

7. And differences over tactics are no basis for intervention. 7A Wright & Miller, § 1909, at 531.

8. *E.g.*, the planning of families, fear of combat, religious scruples, modesty and privacy.

Individual considerations are simply irrelevant to the subject matter of this case, which is the constitutionality of a statute which excludes all women from possible compulsory military service while including all civilian male citizens. As the district court correctly noted, undetermined and unanticipated questions of ultimate utilization of personnel resources cannot justify failing to consider *all* significant resources which can be made available for future contingencies:

> "The die is already cast for substantial female involvement in the military. Furthermore, the military does not lose flexibility if women are registered because induction calls for females can be made according to military needs as they accrue in the future. Though military flexibility might call for less utilization of female inductees in a given crisis situation, it is the antithesis of 'flexibility' to exclude women from the pool of registrants that could be called upon in a time of national need." (Jurisdictional Statement, 41a-43a)

As Secretary of the Army Clifford Alexander put it:

> "No matter what you decide if there is a draft later, if you have women to register you know where they are. You have identified their names, addresses and can locate them quickly." Associated Press, July 19, 1980.

Finally, the bland assertions of the Proposed Intervenors that Congress had their particular situations and beliefs in mind when it enacted male-only registration and conscription (Motion to Intervene, n. 3) are entirely without support in the record. Indeed, the record refutes that contention and precludes consideration of the argument on appeal. (R60-61, 1712-1714) The record conclusively shows, as the Government admitted at trial, that no rea-

soned consideration has been given by Congress to the male-only aspect of conscription since prior to the reinstitution of peacetime registration in 1948. (R1044-1045, 1712-1714)

D. Proposed Intervenors' Ultimate Argument Is Not Cognizable in a Court of Law.

The Proposed Intervenors do articulate explicitly one argument which the Government makes only inferentially (Jurisdictional Statement, 3, 7). Proposed Intervenors fault the Appellant for not pressing upon this Court the chimera that registering women for the draft would have an "overwhelming and unacceptable impact on this country's women" and that "a gender-neutral draft would have [undesirable effects] on our national resolve." (Motion to Intervene, 15). Proposed Intervenors candidly adopt and urge the argument that female registration would imperil popular support for registering men. (*Id.*, at 16-18)

The argument that non-discriminatory treatment of men and women would be politically unpalatable, the new point which the Proposed Intervenors would add to the proceedings, cannot be countenanced in this Court. One of the most important purposes of the Constitution's equal-protection guarantee is to deprive legislators of the option of "pick[ing] and choos[ing] . . . [those] to whom they will apply legislation so as to escape the political retribution that might [result] if larger numbers were affected," *Railway Express Agency, Inc. v. New York,* 336 U. S. 106, 112-13 (1949) (Jackson, J., concurring). The Government "may not employ an invidious discrimination to sustain the political viability of its programs." *Memorial Hospital v. Maricopa County,* 415 U. S. 250, 266 (1974): *accord, Baldwin v. Montana Fish & Game Commission,* 436 U. S. 371, 391 n. 23 (1978).

E. Proposed Intervenors Present No Justiciable Claim or Defense.

Beyond the impropriety of their argument for presentation to any court by any person, it is clear that Proposed Intervenors present no litigable interest in the issue of military preparedness or the registration of *men*. If Congress chooses to forego until more exigent times authorizing the registration of anyone for the draft rather than register men and women, such is the prerogative of Congress in the raising of armies under Article I, § 8 of the Constitution. Ms. Acker, et al. present no interest in that decision other than is present in every citizen's interest in national defense policies. *Schlesinger v. Reservists to Stop the War,* 418 U. S. 208 (1974). Clearly the proper remedy for Proposed Intervenors' political problem lies in the political arena. If their true concern is the need for registration, let them urge Congress to provide for a constitutional system of registration and conscription.

If, on the other hand, their primary concern is that women not be registered, they present no issue ripe for adjudication in this case. Before they could be registered, an Act of Congress and its implementation by the President would be required. Even then, Proposed Intervenors concede that their concern is with as yet hypothetical "detrimental effects on [women which conscription] *might* have". (Motion to Intervene, 13) (emphasis supplied)

Their claims certainly fail to present a ripe "case or controversy" as required by Article III of the Constitution, because they rely on "a state of facts that has not yet appeared . . . and may never appear," *Webster v. Mesa,* 521 F. 2d 442, 444 (9th Cir. 1975), to avoid "a bare possibility of some injury in the future." *Gange Lumber Co. v. Rowley,* 326 U. S. 295, 305 (1945). *Accord, Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd,* 347 U. S. 222, 224 (1954).

F. The Factual Assumption of Proposed Intervenors' Argument Is Facially Invalid.

Underlying the argument of Proposed Intervenors is the assumption that their sociological, psychological and religious beliefs dominate American opinion. They do not. Certainly there is nothing in the record from which such an assumption could be supported. This Court cannot accept the rhetoric of litigants or politicians in lieu of reliable statistical and sociological evidence, scrutinized at trial. In fact, the assumption of national outrage at the thought of registering women is contradicted by the information at hand.

For example, the New York Times-CBS poll released February 20, 1980 asked directly whether the respondent favored registration of men and women, men only, or no registration. Of the general population, 51% favored unisex registration, 31% favored registration of men only, and 18% either opposed registration or had no opinion. Quite similarly, the March 2 and July 20, 1980 Gallup polls, also of the general population, showed 56% and 51%, respectively, favoring registration of women at this time.

Disaffection with the means by which an army is conscripted *could* imperil national security if such disaffection were felt in the ranks of the conscripts themselves. If young men conscripted in a male-only draft believed that they were drafted in an unfairly discriminatory manner, that belief could undermine the morale and performance of the Armed Forces just as discrimination led to the poor morale and performance of "Jim Crow" units in World War II. This Court noted the deleterious effect upon troop morale of exemptions perceived to be unfair in *Gillette v. United States,* 401 U. S. 437, 459-60 (1971). Potential draftees, young men now ages 18 through 24, *oppose the exclusion of women* from the draft by 61% to 35%, according to the February 18, 1980 Newsweek poll of young adults.

CONCLUSION

The proposed intervention would broaden and obfuscate the narrow issue presented by this case: whether the complete exclusion of women from the pool of registrants serves important governmental objectives and is substantially related to any important and legitimate governmental interest. This case never has been about *drafting* equal numbers of men and women, or about judicially narrowing the exclusion of women from combat. (Jurisdictional Statement, 21a-22a, 31a-34a). Neither the interests nor arguments of Proposed Intervenors are properly before this Court.

Intervention should be denied.

Respectfully submitted,

Dated: Sept. 29, 1980

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APPENDIX A

A PHILADELPHIA SUIT became involved when defendants asked that a copy of the Pentagon study be made part of it. Page [illegible]

THE PHILADELPHIA INQUIRER, THURSDAY MORNING, JUNE [illegible]

Suit Is Filed Here to Void Draft Act, Cites Report on War Involvement

By FRANK McDEVITT
and GERALD McKELVEY
Of The Inquirer Staff

The Pentagon study on the early conduct of the Vietnam War will be requested as part of [illegible] filed yesterday in the Federal District Court here [illegible] because it forces [illegible] to participate "in an illegal and unconstitutional war."

asking that the draft be declared unconstitutional.

The suit, filed in behalf of one youth registered with the draft and three who face registration, asks that the Selec-

CLASS ACTION

The suit was brought as a class action in behalf of all youths who face the draft. [illegible]

is already registered, and his brother, Steven, 16, of 5125 Woodbine ave; David Freudberg, 16, of 345 Sinkler rd., Wyncote; and David B. Sitman, 17, of 220 Clearview [illegible] Huntingdon Valley.

Defendants are Curtis W. Tarr, national Selective Service director; all state draft directors and the more than 4000 local draft boards in the U.S.

The suit charges that the Selective Service Act coerces military service "in conflict to their moral, ethical and political beliefs" on eligible youths, because of the "threat of criminal sanction" for noncompliance.

WAR CALLED ILLEGAL

In addition, according to the brief filed by attorney Harold E. Kohn, inducted youths would "be accessories to, aid, abet or collaborate with the commission of war crimes and other acts, including . . . participation in an illegal and unconstitutional war, contrary to recognized principles of military, national and international law."

An associate defense counsel, who asked not to be identified, said, "We will ask the government to produce the Pentagon report on the war published in the New York Times beacuse it is relevant to our case."

... the checks should be deposited with-

9-year-old antidraft suit revived with plan to resume registration

By Tom Masland
Inquirer Staff Writer

Nine years ago, at the height of the Vietnam war, four young Philadelphia men sued the Selective Service System in an effort to have the draft declared unconstitutional.

The draft ended in 1973, although the law authorizing it was never repealed, and most of the plaintiffs forgot about the suit, disappointed that a federal appeals court had stripped it of all but a claim that the all-male draft discriminated against men.

But now, as Congress prepares to wrestle with President Carter's proposal that men and women be required to register for the draft, the suit — the nation's only active challenge to the draft — is finally moving toward resolution.

"We have tried to step it up," said Stuart H. Savett, a partner in the center city law firm that has represented the four men. "We maintain that without women the draft is unconstitutional ... my own personal belief is that it is discriminatory and that females should be included just as they are in Israel."

A three-judge panel in U. S. District Court here is preparing to rule on a government request that the suit be dismissed on grounds that the issue is moot and that the plaintiffs have no standing to sue because they were never drafted. If the judges order the case to proceed, it could provide an early test of the sex issues involved in the creation of any new conscription army

During the last year, a number of Carter administration officials have favored draft registration for both sexes, and last week Carter called for registration of women.

However, House Speaker Thomas O'Neill (D., Mass.) already has predicted that Congress will refuse to order women to register. Accordingly, the administration is preparing to introduce two bills, one calling for registration of men only, the other for registration of both sexes.

"The question has not been raised very much, because the sensitivity to sexual discrimination didn't begin until the mid-1970s, after the draft had already ceased to function," said William Z. Elliott, a Justice Department trial attorney who is representing the government in the Philadelphia suit.

"It is the only pending draft case we've got," he said. "It is a fascinating one, one that has lingered past its time."

Originally, the suit challenged the 1967 draft law on a number of constitutional grounds, alleging, among other things, that the draft was a form of slavery and that it could force men to participate in war crimes.

However, a federal appeals court stripped the suit of all but the charge that the male-only draft is "arbitrary, capricious and without rational and compelling justification in view of modern social and military organization or requirements. ..." The draft system, the suit says, violated the plaintiffs' Fifth Amendment rights of due process and equal protection under the law.

"Most of the (plaintiffs) dropped out, because they thought precisely the sort of thing that Carter is proposing would happen — instead of ending the draft system, women would get drafted too, and that would only widen the problem," said one plaintiff, David B. Sitman, 25, in a telephone interview Wednesday from Israel, where he now lives. "Moreover, the draft system was pretty much moribund and we didn't have much interest."

However, another of the plaintiffs, Robert L. Goldberg, 26, said in a deposition taken during the suit's pretrial phases that he hopes that the suit might still block conscription.

"I see the draftability of women as being a deterrent to drafting anybody at all," he said.

Attorney Donald L. Weinberg said during pretrial arguments last year that the 1967 draft law could easily be revived.

"What can be done by one man in an executive fiat, can be undone," he said.

Weinberg said that a requirement that men and women be drafted could act as a brake on militarism.—

"We're more likely to dig in our heels and object quickly if some of the caskets coming back may be females," he said.

The suit is being considered by District Court Chief Judge Joseph S. Lord 3d, District Judge Edward N. Cahn and Appeals Court Judge Max Rosenn.

SUN-TIMES
CHICAGO, ILL.
M-565,000 S-870,000

JUN-27-80

ACLU sex-bias suit filed to block draft

WASHINGTON (UPI)—The American Civil Liberties Union filed suit Thursday in an effort to strike down, on grounds of sex discrimination, the draft registration law Congress approved a day earlier.

The class-action suit, filed in U.S. District Court here in the name of 16 young men affected by the registration law, charges that by applying only to men, the new law is unconstitutional.

ACLU spokesmen admit the sex discrimination claim is a legal lever to eliminate the entire registration scheme.

Among the 16 named plaintiffs, the ACLU said, are two from the Chicago area: Kenneth Blum, a junior physics major at Oberlin College in Ohio, and Jay Goldring, an Evanston Township High School graduate, now a junior at Columbia University in New York City.

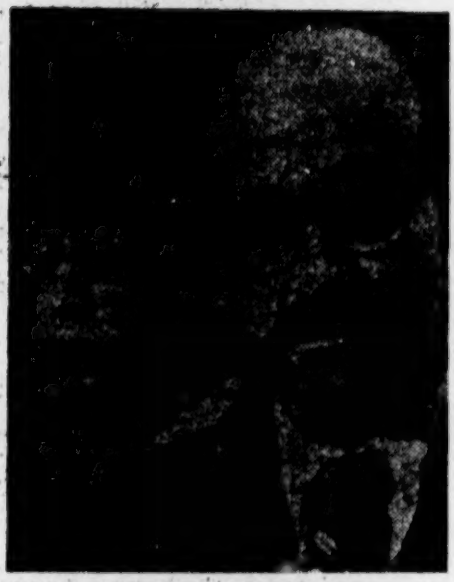
PRESIDENT CARTER is expected to sign the challenged bill shortly. Selective Service Director Bernard Rostker said Carter will issue a proclamation, possibly next Tuesday, reviving registration.

Registration of 19- and 20-year-olds at post offices probably will begin July 21. Failure to register is a felony carrying maximum penalties of a $10,000 fine or five years imprisonment or both.

"We have obviously not considered draft registration a benefit, and we have no desire to extend it to women," ACLU Executive Director Ira Glasser said. "But we believe that if this is successful, it will effectively kill the whole plan."

ISABELLE KATZ PINZLER, ACLU counsel in the suit and director of the ACLU's Women's Rights Project, said, "We believe that under current rulings on sex discrimination by the U.S. Supreme Court, draft registration for men only is unconstitutional.

"In order to exclude women, the government must show that their exclusion is closely and substantially related to an important government purpose. The government cannot make such a showing in this case."



ACLU executive director Ira Glasser announces in Washington he is filing suit to have draft registration declared unconstitutional because women are exempt. Behind him is Jay Goldring, of Evanston, a plaintiff in the suit. (AP)

Pinzler said women have performed capably in the all-volunteer armed forces and have graduated from the military academies. She also noted that Carter, Rostker and Defense Secretary Harold Brown all have called for inclusion of women in draft registration.

The issue could be resolved in another pending suit, a nine-year-old sex-discrimination challenge to the draft begun during the Vietnam War, scheduled to go to trial next Tuesday in Pennsylvania.

DAILY NEWS
NEW YORK, N. Y.
M-1,925,000
S-2,700,000

JUN-27-80

Draft signup to start July 21

(Continued from page 2)

are not infringed upon if she is not required to register for the draft.

The study noted the courts have repeatedly ruled in the past that nothing in the Constitution requires registering or drafting women. The Supreme Court, however, has never ruled on the issue.

A case in federal district court in Philadelphia, dating from the Vietnam war, may add the latest thinking of the courts. A man who was drafted is contending that he was discriminated against because the draft was limited to males.

The Carter administration has been divided on the constitutional question of drafting women. One Pentagon legal study says that "a statutory scheme which serves to reinforce sexual stereotypes or is based on archaic and overbroad generalizations will not be sustained by the Supreme Court under equal protections provisions (of the law)."

Selective Service Director Bernard Rostker has said that drafting women was not needed from a personnel standpoint—there are enough women volunteers to fill all possible female slots—but that registering women probably was the "safest thing" to do from a legal standpoint.

Draft plan will begin on July 21

By JOSEPH VOLZ

Washington (News Bureau)—President Carter will renew draft registration for 4 million young men on July 21, Selective Service officials said yesterday as the American Civil Liberties Union went to court to block the action—the first draft registration since 1975.

Under the plan, all 20-year-old males must register the week of July 21 at post offices across the country, with 19-year-old men registering the following week.

In a suit filed in federal district court here, the ACLU contended that registration of men only was unconstitutional. Although Carter originally included women in the plan to register all 19 and 20-year-olds, Congress limited the registration to males.

The ACLU's real goal

Isabelle Katz Pinzler, director of the ACLU's Women's Rights Project, who filed the suit, said: "In order to exclude women, the government must show that their exclusion is closely and substantially related to an important government purpose. The government cannot make such a showing in this case."

The suit said that women "have performed capably in the all-volunteer force and women are being graduated from the military academies." About 8% of the soldiers in the Army are women and, this spring, women were graduated and commissioned from the service academies for the first time.

ACLU officials said that their goal was not to expand draft registration to include women, despite their military capabilities, but to have the entire program tossed out so that no one—male or female—has to register for the draft.

A Justice Department study, which has not been made available to the public, says that a woman's constitutional rights

STAR
KANSAS CITY, MO.
E-315,000 S-410,000

JUN 27 1980

Draft sign-up set; court test planned

By the Associated Press

Washington—President Carter will instruct 4 million men aged 19 and 20 to line up at post offices for a two-week peacetime draft registration starting July 21, an official says.

Selective Service Director Bernard Rostker said Thursday that 20-year-old men will be required to register the week starting July 21 and 19-year-old men the week starting July 28.

The official proclamation bringing back draft registration will be issued by the president, possibly Tuesday, Rostker said. Registration was suspended in 1975.

Opponents filed suit Thursday, seeking to kill registration on grounds it amounts to unconstitutional sex discrimination against men since women are not required to register. But their attorneys acknowledged some doubt as to whether they can block the initial registrations July 21.

The suit was filed by the American Civil Liberties Union on behalf of all draft-aged American men as a class and on behalf of 18 of them as individuals.

ACLU Executive Director Ira Glasser said: "We think this lawsuit is now the best way to stop draft registration entirely. We believe that under the current rulings on sex discrimination by the U.S. Supreme Court, draft registration for men only is unconstitutional."

An ACLU attorney, Ms. Isabelle Katz Pinzler, said she believes the challenge against draft registration will be before the Supreme Court "before very long."

Ms. Pinzler said the challenge may get a court hearing as early as Tuesday if ACLU lawyers succeed in joining a 9-year-old suit being heard in Philadelphia that day.

That suit by Robert Goldberg, a former Philadelphia resident, seeks to have both the draft and draft registration declared unconstitutional because they don't affect women.

Under the plan outlined by Rostker, 20-year-old men born in January, February or March will be required to register at local post offices July 21. Those born in April, May and June will be required to register July 22; those born in July, August and September will have to register July 23, and those born in October, November and December will have to register July 24. July 25 will be a make-up day.

All 19-year-old men will be required to register the following week on the same schedule.

The draft itself is not being renewed. The purpose of registration is to supply names and addresses of eligible men who could be called for processing if Congress renews the draft in the future.

BULLETIN
PHILADELPHIA, PA.
E-615,000 S-990,000

JUN-27-80

V

ACLU files lawsuit against draft plan

Washington — (UPI) — Saying it is unconstitutional because it excludes women, the American Civil Liberties Union (ACLU) yesterday filed suit to strike down the draft registration law approved by Congress one day earlier.

The class-action suit, filed in U.S. District Court for the District of Columbia in the name of 16 young men affected by the registration law, charges that by applying only to men and excluding women, the new law is unconstitutional.

Final congressional approval was given the bill on Wednesday. It is expected to be signed into law by President Carter shortly.

The first registration of 19- and 20-year-old men probably will begin July 21 at U.S. post offices. Failure to register is a felony and carries maximum penalties of a $10,000 fine and five years in prison.

"This lawsuit arises out of our general opposition to draft registration," said ACLU director Ira Glasser. "We think that this lawsuit is now the best way to stop draft registration entirely."

Selective Service System Director Bernard Rostker and Postmaster General William Bolger are named as defendants.

"We believe that under current rulings on sex discrimination by the U.S. Supreme Court, draft registration for men only is unconstitutional," Isabelle Katz Pinzler, ACLU counsel in the suit and director of the ACLU's Women's Rights Project, told a news conference.

"In order to exclude women, the government must show that their exclusion is closely and substantially related to an important government purpose," she said. "The government cannot make such a showing in this case."

Another pending suit, a nine-year-old sex discrimination challenge to the draft which originated during the Vietnam War, is scheduled to go to trial next Tuesday in Philadelphia.

Both Glasser and Ms. Pinzler said the ACLU opposes peacetime registration and conscription of both men and women.

Ms. Pinzler said women have performed capably in the all-volunteer armed forces and are being graduated from the military academies.

CHRISTIAN SCIENCE
MONITOR
BOSTON, MASS.
M-200,000

JUN-27-80

Draft sign-up foes file suit

Washington

The American Civil Liberties Union filed suit Thursday seeking to strike down President Carter's draft registration plan on grounds it discriminates against women. The class-action suit was filed in US District Court for the District of Columbia in the name of 16 young men affected by the registration law.

Final congressional approval was given the bill on Wednesday and it is expected to be signed by President Carter shortly.

Registration for a possible future draft by about 4 million young men born in 1960 and 1961 is slated to begin at 34,000 US post offices next month. Failure to register is a felony and carries maximum penalties of a $10,000 fine and five-year imprisonment or both.

"This lawsuit arises out of our general opposition to draft registration," said ACLU director Ira Glasser. "We think that this lawsuit is now the best way to stop draft registration entirely."

Another pending suit, a nine-year-old sex discrimination challenge to the draft which originated during the Vietnam war, is scheduled to go to trial next Tuesday in Pennsylvania, and the matter could be resolved there.

CHRONICLE
SAN FRANCISCO, CAL.
M-475,000

JUN-27-80

Draft Callup Suit Charges Sex Bias

Washington

The American Civil Liberties Union yesterday filed suit seeking to strike down the draft registration law that Congress approved Wednesday, on the ground of sex discrimination.

The class action suit was filed in federal court in the District of Columbia in the name of 16 young men who are affected by the registration law. The suit charges that by applying only to men and excluding women the new law is unconstitutional.

Final congressional approval was given the legislation Wednesday, and the bill is expected to be signed soon by President Carter.

Registration of 19- and 20-year-olds probably will begin July 21 at U.S. post offices. Failure to register is a felony, and carries maximum penalties of a $10,000 fine and five-year imprisonment, or both.

"This lawsuit arises out of our general opposition to draft registration," said ACLU director Ira Glasser. "We think that this lawsuit is now the best way to stop draft registration entirely."

Selective Service System director Bernard Rostker and Postmaster General William Bolger are named as defendants.

"We believe that under current rulings on sex discrimination by the U.S. Supreme Court, draft registration for men only is unconstitutional," said Isabelle Katz Pinzler, ACLU counsel in the suit and director of the ACLU's Women's Rights Project.

"In order to exclude women, the government must show that their exclusion is closely and substantially related to an important government purpose," she said at a news conference. "The government cannot make such a showing in this case."

Another pending suit, a nine-year-old sex discrimination challenge to the draft that originated during the Vietnam War, is scheduled to go to trial Tuesday in Pennsylvania, and the matter could be resolved there.

Both Glasser and Pinzler said the ACLU opposes peacetime registration and conscription of both men and women.

United Press

CONSTITUTION
ATLANTA, GA.
M-215,000

JUN-27-80

ACLU Files Sex Bias Suit To Block Draft Sign-Up

WASHINGTON (UPI) — The American Civil Liberties Union Thursday filed suit seeking to strike down the draft registration law Congress approved one day earlier on grounds it discriminates against women.

The class action suit, filed in U.S. District Court for the District of Columbia in the name of 16 young men affected by the registration law, charges that by excluding women the new law is unconstitutional.

The bill got final congressional approval Wednesday and is expected to be signed by President Carter soon.

First registration of 19- and 20-year-olds probably will begin July 21 at U.S. post offices. Failure to register is a felony and carries maximum penalties of a $10,000 fine and five-year imprisonment or both.

"This lawsuit arises out of our general opposition to draft registration," said ACLU director Ira Glasser. "We think that this lawsuit is now the best way to stop draft registration entirely."

Selective Service System director Bernard Rostker and Post Master General William Bolger are named as defendants.

"We believe that under current rulings on sex discrimination by the U.S. Supreme Court, draft registration for men only is unconstitutional," Isabelle Katz Pinzler, ACLU counsel in the suit and director of the ACLU's Women's Rights Project told a news conference.

"In order to exclude women, the government must show that their exclusion is closely and substantially related to an important government purpose," she said. "The government cannot make such a showing in this case."

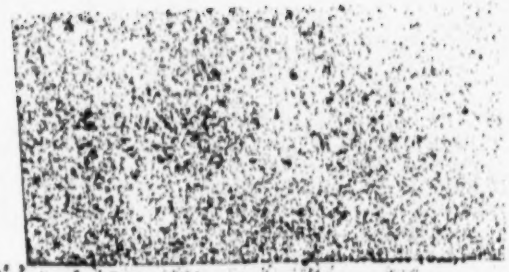
Another pending suit, a nine-year-old sex discrimination challenge to the draft which originated during the Vietnam war, is scheduled to go to trial next Tuesday in Pennsylvania, and the matter could be resolved there.

Both Glasser and Ms. Pinzler said the ACLU opposes peacetime registration and conscription of both men and women.

"We also believe that if Congress were faced with the choice between including women or abandoning draft registration, they would abandon draft registration," Glasser said.

Carter has said he opposes renewal of the draft at this time.

MORNING SUN
BALTIMORE, MD.
D-185,000 S-355.00



JUN-27-80

July 21 draft-signup start is set, but foes file suit

Washington (AP)—Peacetime draft registration for men was scheduled yesterday to begin July 21, but opponents filed suit to try to kill the registration program as unconstitutional sex discrimination.

Bernard Rostker, the director of Selective Service, said President Carter will issue a proclamation, possibly next Tuesday, instructing all 20-year-old men to register between July 21 and the end of that week and all 19-year-old males to begin registering July 28.

The American Civil Liberties Union filed suit in United States District Court seeking to outlaw the draft registration as unconstitutional because under the legislation no women are required to register.

"We think this lawsuit is now the best way to stop draft registration entirely," said Ira Glasser, the ACLU's executive director. "We believe that under current rulings on sex discrimination by the United States Supreme Court, draft registration for men only is unconstitutional."

Isabelle K. Pinzler, a lawyer in the case, said the ACLU will try to block registration from taking place next month, "but we are realistic enough to know we may not be able to do that."

However, she said, all registration forms filled out next month and all computer lists and other records would have to be destroyed if registration is later ruled unconstitutional.

President Carter had asked Congress for authority to register both men and women. The House and Senate both said no to the registration of women. Congress did approve, with a final House vote Wednesday, Mr. Carter's request for $13.3 million to renew registration for men only.

The draft itself remains dormant. Registration is designed to supply names and addresses of men eligible to be called for military service if Congress in the future renews the draft itself.

The American Civil Liberties Union filed its suit on behalf of all young American men as a class and 16 persons in particular. One of these, 17-year-old David Halperin, of Bethesda, Md., said:

"Of course, it is not a burden to go down to the post office and register. But it is a step toward war. It is being an instrument in a policy that could lead to war, and that is something I am not willing to do."

Miss Pinzler said she and other ACLU attorneys are trying to win a hearing as early as next Tuesday by joining in a nine-year-old suit scheduled to be heard that day in a Philadelphia courtroom.

In that suit Robert Goldberg, a former Philadelphia resident, is seeking to have both the draft and the registration of men declared unconstitutional sex discrimination.

If the ACLU is not able to join in the Philadelphia suit, Miss Pinzler said, the ACLU will try to obtain a hearing in the U.S. District Court in Washington before the July 21 beginning of registration.

Either way, she said, "I assume they [the issues] are going to be in the Supreme Court before very long."

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY OF STACEY ACKER, ET AL., MOVANTS FOR INTERVENTION, TO BRIEF OF APPELLEES IN OPPOSITION TO MOTION TO INTERVENE

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REPLY OF STACEY ACKER, ET AL., MOVANTS FOR INTERVENTION, TO BRIEF OF APPELLEES IN OPPOSITION TO MOTION TO INTERVENE

Appellees' response in opposition to our Motion to Intervene is striking because of the vehemence with which it seeks to exclude from this case representatives of the particular group which will be most affected by its outcome. Indeed, at page 13 of their Brief, the appellees choose to dispute what is surely plain to everyone: that women necessarily will be directly affected by the Court's disposition of this case. Appellees' arguments

should be rejected,[1] and this Court should permit these Movants to intervene fully in this case.

First, appellees' weak attempt to show that this case had the type of prominence that would reasonably put movants on notice as to its existence fails totally. At best, appellees are able to point to a few isolated comments, in the course of *only one* Administration spokesman's testimony during several days of Congressional hearings in March 1980 on President Carter's proposed reinstitution of draft registration. If appellees' quotation of these remarks (Brief of Appellees at pp. 7-8) is designed to suggest that this case was highly publicized, that clearly is *not* the case. Indeed, a recent article appearing in the *The Washington Post* entitled "Luck and Accidents Help in Resurrection of 9-Year-Old Draft Case" describes graphically that this case was so little publicized that even Justice Department personnel were taken by surprise by its emergence. *See* Appendix A, *infra*. If, on the other hand, appellees are suggesting that representatives of the group most directly involved should now be excluded because they failed to act on the very slim public attention given to the existence of this lawsuit, that argument unjustifiably minimizes the importance of the Movants'

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[1] Appellees apparently concede that the Movants meet the intervention standards prescribed by Rule 19(a)(2) and 19(b) of the Federal Rules of Civil Procedure for intervention in a District Court. *See, e.g., Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *Natural Resources Defense Council v. Costle*, 183 U.S. App. D.C. 11, 561 F.2d 904 (1977); *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350 (2d Cir. 1975). The only issue before this Court, therefore, is whether the Movants' failure to move to intervene in the District Court (the reasons for which are explained in our original Motion) should now bar them from becoming parties in this Court.

full participation. When the weighty constitutional issues are considered, along with the fact that *no* party presently represents the interests of millions of women in the United States, and the fact that the government's and the appellees' interests are not totally adverse, we submit that the high burden being urged by appellees is contrary to the best interests of the administration of justice.

Second, permitting Movants to intervene now will not, as appellees suggest, be "disruptive and unfair" to them and to the Court. Movants' arguments are supported by the public records, including the Congressional debates leading up to the reinstitution of draft registration. To be sure, appellees will be confronted with, and the Court will be asked to consider, additional arguments that were not addressed below, made on behalf of a group of persons who will be as directly affected by this Court's decision as are the appellees. But doing so cannot be described as "disruptive" or "unfair" to the appellees. On the contrary, it will insure that this Court's decision is premised upon full consideration of all relevant arguments, and that the final decision is fair to all persons directly interested.[2]

Third, appellees' description of Movants' arguments as "individual reasons" for exemption (Brief of Appellees at p. 10) is a total mischaracterization. Each of the Movants has expressed her reason why she believes women should not be subject to registration and the draft. While

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[2] An examination of appellees' Motion to Affirm demonstrates that, in the absence of the Movants, the only arguments this Court is likely to hear are arguments relating to "military flexibility and effectiveness" (p. 22), an issue on which the Executive Branch has already expressed itself as favoring the position of its adversary – the appellees. Every other argument is brushed away as an "archaic idea" which "perpetuates the ancient sexual stereotypes" (p. 23).

expressed in personal terms, all those reasons are representative of a belief shared by many women in this country. Separately and in the aggregate, they amply justify a congressional decision to continue the historically recognized exemption for women from registration and the draft. These reasons were known to the Congress when it considered President Carter's proposal that women be required to register, and they deserve equal consideration by the Court on the question whether that decision, to continue the exemption for women from registration and induction, was proper and supportable.

Finally, appellees' argument that it is "clear" that Movants have "no litigable interest in the issue of military preparedness or the registration of *men*" (Brief of Appellees at p. 13; emphasis in original) is sophistry. The issue that appellees have presented by their lawsuit is not whether men should be registered, but whether men should be registered *while women are not*.[3] To resolve the issue as the district court did obviously leaves Congress bound, when it enacts a new registration law, to include women. By denying Movants the opportunity now to present their arguments in opposition to such a result is to deny them *any* opportunity to present those arguments.

---

[3]Indeed, in their Motion to Affirm, the appellees state (p. 3, emphasis in the original):

> Thus the only issue in this case is the validity of the *total exclusion* of *all females* from *registration* as potential draftees into any military position.

CONCLUSION

Movants should be granted leave to intervene as appellants if probable jurisdiction is noted.

Respectfully submitted,

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APPENDIX A

THE WASHINGTON POST Wednesday, October 22, 1980 A9

Luck and Accidents Help in Resurrection of 9-Year-Old Draft Case

This is the first in a series of occasional articles that will trace the course of one major case through this term of the Supreme Court.

By Fred Barbash
Washington Post Staff Writer

Nine years ago, while men were being drafted and killed in Vietnam, a Philadelphia judge dismissed a suit challenging the military draft. The action went largely unnoticed outside of town for it was just another antiwar protest, one among thousands.

On July 18, 1980, a three-judge federal court panel ruled in the same case that draft registration was unconstitutional because it excluded women, sending the issue to the Supreme Court where it may produce a landmark ruling this term.

"Where in the devil," a Justice Department lawyer taken by surprise that

July day commented, "did that ruling come from?"

The answer — how a nine-year-old relic of a case was reborn — is another strange tale of the legal system, of how it is ruled by luck, as much as by judges, by accidents as well as by precedents.

The case dismissed nine years ago is indeed the same one that produced the July 18 ruling now before the Supreme Court. It started, its backers concede, without a prayer: both the facts and the law were against it. It hung on desperately, by a loophole, all that time, waiting for the facts and the law to change. By luck, they did. In the three-judge panel ruling, the case without a prayer didn't even sound close.

It owes much of its success to the government, which could have brought the case to trial before everything changed. Donald Weinberg, a lawyer for the draft eligible class of men represented in the suit, thinks he might have lost then. Instead, government lawyers, doing what law school students are taught to do for defendants, moved at every step along the way to avoid trial. Then, to make matters worse, the government provided the facts that convinced the judges that the all-male draft was unconstitutional.

The case, as it now stands, challenges the draft registration because it distinguishes between the sexes for no substantial reason. But when a group of draft-eligible war protesters began it on July 16, 1971, in U.S. District Court, sex discrimination was only a minor part, a way of achieving something else.

The suit originally was intended to end the Vietnam war. It challenged the draft as involuntary servitude (slavery), a violation of due process and of the right of free expression and as an illegal tool of an unconstitutional war.

Judge James H. Gorbey quickly dismissed the suit, sending it, he must have thought, to that same never-never land where most of the other antiwar suits were put to rest.

The plaintiffs appealed and on May 11, 1973, the 3rd U.S. Circuit Court of Appeals in Philadelphia agreed with Gorbey that most of the claims should be thrown out. One, the sex discrimination component, should be preserved, the court ruled, simply because there had been no prior rulings on which to base a dismissal. Gorbey then approved the sex discrimination count for consideration by a three-judge panel.

Had there been a trial at this point, it might have ended quickly. By 1974,

for one thing, there was no draft. If there was no draft, there might be no case. Only an obscure provision of the 1949 draft law — making men previously deferred from the draft eligible until their 35th birthday — was used to keep it a barely live controversy.

But even if there had been a draft law still on the books, the nation's courts had never made it illegal to distinguish between men and women in the law. In 1974, legislatures and Congress could, with little justification, deny almost anything on the basis of gender. There was no legal precedent to throw out the draft, or anything else, because women were excluded.

But in a totally unrelated case (Craig Vs. Boren) in 1976, the Supreme Court changed all that. From then on, the court ruled, distinctions between men and women in the law would have to be "substantially related to an important government interest."

To judges, the new language was critical, just short of enactment of the Equal Rights Amendment. To the government, it was potentially devastating.

Government lawyers would now have to show that the exclusion of women from the draft by Congress was based on an important reason. Vague justifications, stereotypes, were no longer adequate. And the justifications for ex-

cluding women in the draft law were laced with stereotypes.

When Congress enacted the original draft legislation in 1949, as a judge in the 1980 case would describe it, there was "an aura of male chauvinism permeating congressional attitudes toward women in the military."

Here, for example, is Rep. James E. Van Zandt (R-Pa.) in 1948 discussing a reason for not letting women command men in the military. "There is a not a member of the House Committee on Armed Services," Van Zandt said during one hearing, "who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a WAVE officer. Put yourself in the position of an enlisted man and I am sure you will agree with them."

And here is then-Gen. Dwight D. Eisenhower expounding before a congressional committee on how the committee members did not have to worry about expenditures for pensions for women in the military. Few women will ever become eligible by serving their full 30 years, he said. "They will ordinarily — and thank heaven — they will ordinarily get married" and leave the service.

The antidraft lawyers dug up all the

material from the 40s and put it in the record.

The government would still argue that the affairs of the military are exempt from the Supreme Court's new standard for reviewing distinctions based on gender. And even if the military was not exempt, there was still a substantial reason that could pass muster under the new standard: military flexibility.

"To replace combat-capable males with combat-barred females denies the military the flexibility it obtains through an all-male draft and conscription," the government argued.

Had the case gone to trial, instead of being delayed, there would have been little data available to the plaintiffs with which to dispute the government's argument. In the end, however, the government did their work for them.

It was the winter of 1979 and lawyer Weinberg recalls feeling pessimistic about the chances for keeping the case alive. There was still no draft and he felt the judges were skeptical about allowing the case to continue.

"You never know when the draft might be reinstituted," Weinberg recalls telling one of the judges during a private conference, trying anything to convince

him the case was still relevant. "You never know when there might be some kind of invasion."

A few weeks later, in December last year, the Soviet Union invaded Afghanistan. President Carter announced reinstitution of draft registration and one of the judges joked to Weinberg: "You must have a pipeline to Brezhnev."

That saved the case. But it didn't make the case. That was left, once again, to the government. In the years of the case's delay, the utilization of women in the military increased dramatically, from 39,000 at the beginning to over 150,000 by 1979. The military was quietly studying female effectiveness and finding, for example, that properly trained women could load 95-pound shells into 155 mm howitzers just as effectively as men. The Army instructed field commanders to allow women full battlefield access in the event of war, removing many, though not all, of the old restrictions.

Finally, when the president proposed that women be included in the new draft, the administration hauled out top Pentagon officials to support this position before a skeptical Congress.

The "work women in the armed forces do today is essential to the readiness and the capability of the forces,"

Assistant Defense Secretary Robert B. Pirie told Congress. "It is in the interest of national security that, in an emergency requiring the conscription for military service of the nation's youth, the best qualified people for a wide variety of tasks in our armed forces be available. The performance of women in our armed forces supports the conclusion that many of the best qualified people . . . will be women."

This type of testimony would ultimately decide the case. And an extraordinary public admission by a Justice Department lawyer during those hearings would put the nail in the coffin.

Larry L. Simms, deputy assistant attorney general (he works for the agency arguing against the draft in Philadelphia), told members of Congress that the historical record — the male chauvinist comments in 1948 and 1949 — were so devastating that a whole new, after-the-fact record would be required to defend the all-male draft.

As a result of Simms' testimony, the judges decided it wasn't even worth exploring in depth the 1948 legislative history to find a reason for excluding women.

In their opinion, the three judges based their ruling in large measure on

government testimony. Military experts had testified, they recalled, that women are necessary in the event of an emergency callup. They had testified that women have been "a success story" in the military.

"The principal reason the government proffers for a male-only registration," the court said, "is that it provides military flexibility. We therefore hold that the complete exclusion of women from the pool of registrants does not serve 'important' governmental objectives' and is not 'substantially related' to any alleged government interest."

No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT

QUESTION PRESENTED

Whether the exclusion of females from the draft registration provisions of the Military Selective Service Act, 50 U.S.C. App. 451 *et seq.*, invidiously discriminates against males in violation of the Due Process Clause of the Fifth Amendment.

* Other appellees are David Sitman and Owen F. Jones. On July 1, 1980, the district court certified a class, pursuant to Rule 23(b)(2), Fed. R. Civ. P., of all males registered or subject to registration under Presidential Proclamation No. 4771 and the Military Selective Service Act or liable for training and service in the Armed Forces of the United States under the Act (J.S. App. 2a–4a, 44a). As we advised the Court by letter of August 22, 1980, Henry R. Sheppard, Acting Pennsylvania State Director of Selective Service, and Local Board No. 138 in Philadelphia, Pennsylvania, originally also were defendants. However, there are at present no local boards and those offices have been vacant for some years. Although Joseph P. McCullough was designated "provisional" State Director of Selective Service for Pennsylvania on August 1, 1980, he has not been involved in the current registration process and, at present, has no official function and receives no salary. Accordingly, Mr. McCullough has not been treated as a party to this appeal.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a–43a) is unreported.

JURISDICTION

In July 1974, pursuant to 28 U.S.C. (1970 ed.) 2282, a three-judge district court was convened to hear appellees' challenge to the constitutionality of the Military Selective Service Act, 50 U.S.C. App. 451 *et seq*. The district court held unconstitutional and enjoined enforcement of the male-only registration provisions of the Act, 50 U.S.C. App. 453, by order dated July 18, 1980 (J.S. App. 44a–45a). A notice of appeal to this Court (J.S. App. 46a) was filed on July 18, 1980. The jurisdictional statement was filed on August 19, 1980, and probable jurisdiction was noted on December 1, 1980 (J.A. 302). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in pertinent part:

> The Congress shall have power * * *
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> * * * * *
>
> To raise and support Armies * * *;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
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> * * * * *

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 3 of the Military Selective Service Act, 50 U.S.C. App. 453, provides:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of

every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

Section 4(a) of the Military Selective Service Act, 50 U.S.C. App. 454(a), provides in pertinent part:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix], every person required to register pursuant to section 3 of this title [section 453 of this Appendix] who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: *Provided*, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further*, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the

Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

STATEMENT

1. This case involves the constitutionality of the statutory provisions governing draft registration and, consequently, under present law, the continuing authority of the President and Congress to raise armed forces through conscription.

Article I, Section 8, of the Constitution commits to Congress the responsibility to raise and support Armies, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces. In the Military Selective Service Act, Congress established procedures for maintaining "adequate armed strength * * * to insure the security of [the] Nation" (50 U.S.C. App. 451(b)) and for responding to war or other national emergency. Although the Act provides separately for registration and for conscription (and attendant classification), the processes are interlocked. Thus, Section 453 empowers the President to require by proclamation the registration of "every male citizen" and male resident alien "between the ages of eighteen and twenty-six," and Section 454(a) renders individuals "required to register * * * liable for training and service in the Armed Forces" upon the issuance of an induction notice. Section 454 further provides that every registrant shall be "immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces."[1]

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[1] With the advent of the All-Volunteer Force, the Act was amended generally to preclude conscription as of July 1, 1973. Pub. L. No. 92-

In early 1980, President Carter determined that it was necessary to reinstate the draft registration process.[2] That decision was, in part, a response to the invasion of Afghanistan, which marked "the first time since World War II [that] the Soviets moved in force into the territory of a neighboring nonaligned country." *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1802 (1980) (joint statement of Dr. John P. White, Deputy Director, Office of Management and Budget, Dr. Bernard Rostker, Director. Selective Service System, and Richard Danzig, Principal Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)). A year earlier, the President had opposed a reactivation of draft registration. But, as his delegates advised the Senate Armed Services Committee on April 2, 1980 (*id.* at 1805; emphasis in original):

> When the issue of peacetime registration was raised last September * * * the Secretary of Defense and the Director of OMB said that registration was not necessary * * * *at that time*. There was no crisis that had the potential for an imminent threat to the vital interests of the United States. The situation is different now, and so is our position on the issue of peacetime registration. The Administration's position before this crisis in Southwestern Asia was that *the President would not hesitate to use his present authority to require registration at any time he sees it as a necessary step to preserving or enhancing our national security interests*. He is convinced that time has come.

In addition to recommending the transfer of funds required for registration from the Department of Defense to

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129, Section 101(35), 85 Stat. 353, 50 U.S.C. App. 467(c). In 1975, President Ford discontinued Selective Service registration procedures. Presidential Proclamation No. 4360, 11 Weekly Comp. of Pres. Doc. 318 (Apr. 7, 1975). Reactivation of the conscription process thus would require amendment of the Act.

[2] In his State of the Union Address in January 1980, the President had recognized that registration was necessary to improve the Nation's defense posture (H.R. Doc. No. 96-257, 96th Cong., 2d Sess. 5 (1980)).

the Selective Service System, the President, largely on the basis of equitable considerations,[3] requested Congress to amend the Military Selective Service Act to permit the registration and conscription of women. *Presidential Recommendations for Selective Service Reform—A Report to Congress Prepared Pursuant to P. L. 96-107* (Feb. 11, 1980) (J.A. 29-79).[4] Congress agreed that reinstitution of registration was "vitally necessary" (S. Rep. No. 96-826, 96th Cong., 2d Sess. 157 (1980)),[5] and on June 12, 1980, allocated funds for that purpose through H.R.J. Res. 521.[6] But, after extensive hearings before committees of both

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[3]See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1854-1856 (statement of Mr. Danzig); *Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (Mar. 5, 1980) (unpublished) (joint statement of Robert B. Pirie, Jr., Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, Dr. Bernard D. Rostker, Director, Selective Service System, and Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel) (J.A. 217-218).

[4]The President acknowledged (*Presidential Recommendations*, *supra* (J.A. 60)), however, that

> [t]he maximum number of women that can be used is subject to three constraints: (1) legislative prohibitions against the use of women in certain military positions, (2) the policy to reserve certain assignments, such as close combat roles, for men only and (3) the need to reserve a substantial number of noncombat positions for men in order to provide a pool of ready replacements for close combat positions.

[5]During previous Senate hearings on the reinstitution of registration procedures, serious concern also had been expressed about the Nation's inability to mobilize large military forces on short notice. *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 1 (statement of Senator Nunn), 3-4 (statement of Senator Morgan) (1979). These hearings resulted in a Senate Armed Services Committee recommendation that male-only registration be reinstituted. S. Rep. No. 96-226, 96th Cong., 1st Sess. (1979).

[6]H.R.J. Res. 521 was signed into law on June 27, 1980.

the House of Representatives and the Senate, Congress declined to require the registration of women.[7]

As the Senate Armed Services Committee explained (S. Rep. No. 96-826, *supra*, at 157), "the starting point for

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[7]During the two years preceding that decision, both houses of Congress had given thorough consideration to the registration issue and, in particular, to the question of registering women. In 1979, both the House and Senate Armed Services Committees held extensive hearings on registration under the Military Selective Service Act. See *Reinstitution of Procedures for Registration Uunder the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. (1979); *Department of Defense Authorization for Appropriations for Fiscal Year 1980 and Legislation Concerning the Selective Service System: Hearings on H.R. 1872 [H.R. 4040] Before the House Comm. on Armed Services*, 96th Cong., 1st Sess. 939-1172 (1979). The Senate Armed Services Committee voted 12-5 to report S. 109, which would have required the reinstitution of registration procedures in January 1980, without a requirement for the registration of women. S. Rep. No. 96-226, 96th Cong., 1st Sess. 1, 8-9, 28 (1979). The bill was considered on the Senate floor on September 21, 1979. 125 Cong. Rec. S13129-S13130, S13132-S13133, S13148-S13183 (daily ed. Sept. 21, 1979). At the end of that day of debate, the bill was returned to the Senate calendar and no further action was taken. U.S. Senate Calendar Order No. 240, 96th Cong., 1st Sess.; 125 Cong. Rec. S13182 (daily ed. Sept. 21, 1979). Also in 1979, the House Armed Services Committee included in its Fiscal Year 1980 Defense Authorization Bill a provision that required the President to commence registration of men in January 1981 and to report to Congress on, among other issues, the question of the registration and induction of women. H.R. 4040, 96th Cong., 1st Sess. §§ 812-813 (1979). While the registration provision was deleted after debate on the House floor, 125 Cong. Rec. H7765-H7782 (daily ed. Sept. 12, 1979), the reporting provision remained in the final version of the bill, S. 428, 96th Cong., 1st Sess. (1979). See H.R. Rep. No. 96-546, 96th Cong., 1st Sess. 15, 50 (1979).

Both Houses of Congress held additional hearings on these issues in 1980. See *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. (1980); *Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (Mar. 5, 1980) (unpublished) (J.A. 213-243). On March 6, 1980, the House Subcommittee tabled H.R. 6569, which would have amended the Military

any discussion of the appropriateness of registering women for the draft is the question of the proper role of women in combat." Thus, while the Committee recognized (*ibid.*) the important contributions being made by women volunteers in noncombat roles and the dramatic increase in recent years in the number of women volunteering to fill those roles—a trend that it expected to continue—it focused on the facts that the purpose of registration is to "provide[ ] the means for early delivery of inductees in an emergency" and that the primary requirement of the induction system in such a situation would be for replacements in the combat arms and in close combat support roles for which "mobilization manpower is so severely short" in the volunteer forces. S. Rep. No. 96-826, *supra*, at 158. But current law and policy (not challenged by appellees herein) prohibit the assignment of women to these positions in which the greatest need exists. See discussion at pages 21-22 & 29-31, *infra*. In the Committee's view, those restrictions were "the most important reason for not

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Selective Service Act to permit the registration of women, by a vote of 8-1. Legislative Calendar, House Comm. on Armed Services, 96th Cong., 2d Sess. 53 (Sept. 30, 1980).

As discussed in the text *supra* (at 4-5), H.R.J. Res. 521 was the appropriations measure transferring funds for the Department of Defense to the Selective Service System to permit registration to begin in 1980. The House rejected the registration of women during consideration of H.R.J. Res. 521 on April 22, 1980. 126 Cong. Rec. H2728-H2729, H2747 (daily ed. Apr. 22, 1980). When the resolution was considered in the Senate, an amendment that, in effect, would have required the registration of women also was defeated after extensive debate. 126 Cong. Rec. S6527-S6549 (daily ed. June 10, 1980).

The Senate Armed Services Committee, meanwhile, had rejected, by a vote of 12-5, a pending proposal (S. 2440) to register young women under the Military Selective Service Act and had adopted Specific Findings on the issue of registering young women. Those findings were included in the Committee's report on the Fiscal Year 1981 Defense Authorization Bill, see S. Rep. No. 96-826, 96th Cong., 2d Sess. 160-161 (1980), and were specifically endorsed by the House-Senate Conferees on the Authorization Bill. See S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980). Both Houses of Congress subsequently adopted the findings by passing the Conference Report. 126 Cong. Rec. H7800, S11,646 (daily ed. Aug. 26, 1980).

including women in a registration system." S. Rep. No. 96-826, *supra*, at 157. The Senate Armed Services Committee's Specific Findings on the registration of women were expressly adopted in conference and endorsed by the full Congress (see note 7, *supra*).

On July 2, 1980, President Carter signed Proclamation No. 4771. The Proclamation required men born in 1960 and 1961 to register during the two-week period commencing July 21, 1980, required men born in 1962 to register during the week of January 5, 1981, and required men born on or after January 1, 1963, to register during the 30 days prior or subsequent to their eighteenth birthday (but in no event prior to January 5, 1981). Presidential Proclamation No. 4771, *reprinted in* 45 Fed. Reg. 45247 (1980).[8]

2. The present suit, challenging the Military Selective Service Act on a variety of grounds, was filed in the United States District Court for the Eastern District of Pennsylvania in 1971 by several male citizens who were subject to registration and induction.[9] In 1974, a three-

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[8]Paragraph 1-109 of Proclamation No. 4771 provides a deferral for those who cannot register at the assigned time "for some reason beyond their control such as hospitalization or incarceration" until 30 days after the termination of the condition that prevented their registration. With the exception of the registration of those subject to this deferral provision, registration of men born in 1960 and 1961 was completed during the two-week period commencing July 21, 1980, and registration of men born in 1962 was completed during the week of January 5, 1981. Registration of men born on or after January 1, 1963, is presently ongoing.

[9]The plaintiffs alleged that the Act amounted to a taking of property without due process, required involuntary servitude, violated their rights to free expression and assembly, was unlawfully implemented to advance an unconstitutional war, and impermissibly discriminated between males and females. February 19, 1980 memorandum at 1-2 (attachment G to appellant's stay application filed with this Court). An initial application to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282 was denied in April 1972 and the suit was dismissed. *Rowland* v. *Tarr*, 341 F. Supp. 339 (E.D. Pa.). On appeal, the Third Circuit rejected as insubstantial all but the last of the plaintiffs' claims. The court of appeals remanded the case for a determination of whether the equal protection claim was sufficiently substantial to require the

judge district court was convened to consider only the question of whether the Act impermissibly discriminates on the basis of gender in limiting registration to males. After several years of dormancy,[10] the case was scheduled for trial in 1980. The district court certified appellees—who include at least one individual subject to the July 21, 1980 registration requirement—as representatives of a nationwide class of potential registrants and conscripts (J.S. App. 2a–4a), and a hearing was held on July 1, 1980.

In an opinion dated July 18, 1980, the district court essentially held (J.S. App. 14a) that the rational relationship test applied to the gender-based distinction in the promotion of naval officers in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), no longer obtains, but rather that the male-only draft registration must be shown to be substantially related to an important governmental objective under the standard articulated in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Applying the latter test, the district court refused to accord any deference to Congress' factual findings on the question of military need. Rather, it weighed and reassessed the evidence concerning mobilization flexibility provided by an all-male registration and draft *de novo*, and determined independently that Congress' judgment that national defense would be best served by a draft limited to males was wrong (J.S. App. 37a–43a). The court

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convening of a three-judge court and whether the plaintiffs had standing to assert that claim. *Rowland* v. *Tarr*, 480 F.2d 545 (1973). On remand, the district court answered both questions in the affirmative, and a three-judge court was convened.

[10]On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, rejected the defendants' threshold challenges to the court's jurisdiction and to the justiciability of the case. *Rowland* v. *Tarr*, 378 F. Supp. 766 (E.D. Pa.). No further proceedings took place until June 1979, when the court proposed to dismiss the case pursuant to E.D. Pa. R. 23(a). At that time, additional discovery was taken and, on February 19, 1980, the court denied defendants' motion to dismiss on standing, mootness and ripeness grounds because it found that there were material questions of fact concerning those issues. February 19, 1980 memorandum (attachment G to appellant's stay application filed with this Court).

based this conclusion largely on its own interpretation of the evidence presented to Congress by the Executive Branch in favor of the registration of women, and on its own views as to how women conscripts might be deployed (*id.* at 41a–43a). The court declared the registration provisions unconstitutional and enjoined the government from requiring registration (J.S. App. 44a–45a).

On the same day, the district court denied a request for a stay pending appeal and the government applied for a stay from this Court. On July 19, 1980, Justice Brennan stayed the execution and enforcement of the district court's judgment pending the issuance of the judgment of this Court (J.S. App. 53a).

SUMMARY OF ARGUMENT

I.

In declaring the male-only registration requirement unconstitutional, the district court subjected the Military Selective Service Act to the intermediate equal protection standard of review articulated in *Craig* v. *Boren*, 429 U.S. 190 (1976). But the gender-based classification at issue here relates directly to concerns of national defense, and thus properly is considered under the more deferential "rational basis" standard applied under analogous circumstances in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

Historically, Congress properly has been afforded wide latitude in the exercise of its express powers under Article I, Section 8, of the Constitution to raise and regulate armies. Because the war powers are textually committed to Congress, they necessarily confer plenary authority to say "who shall serve * * * and in what way." *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931). In view of this specific delegation of authority to Congress, it would be inappropriate for a district court to adopt a standard of review that permitted it to substitute its judgment for that of Congress on matters involving the composition of the armed forces, even "in the unlikely event that [it] possessed [the] requisite technical competence to do so." *Gilligan* v. *Morgan*, 413 U.S. 1, 8 (1973).

The court below believed that the standard of review "should not vary from one factual context to another" (J.S. App. 19a). But that conclusion not only ignores *Schlesinger* v. *Ballard*, it also contradicts a consistent line of constitutional cases in which the Court has relaxed review standards in order to accommodate the judgments of the coordinate branches in matters involving the control and regulation of military affairs. See, *e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) (relaxed review standard applies in determining whether military code is void for vagueness because "Congress is permitted to legislate both with greater breadth and with greater flexibility" in matters governing conduct of military affairs).

Application of the "rational relationship" standard of review is justified in this case by considerations in addition to the traditional deference due Congress in the exercise of its powers under Article I, Section 8, of the Constitution. First, the rational relationship test is additionally appropriate because the male-only registration provision is based not on sexual stereotypes, but on the ineligibility of women to be assigned to combat positions, which is unchallenged in this case. See *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508. Thus, men and women alike who are unqualified for combat training and assignment are equally exempt from involuntary conscription. Cf. *Parham* v. *Hughes*, 441 U.S. 347 (1979) (plurality opinion); *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

Moreover, because the combat restrictions on women bear a very direct relationship to their ability to perform in and contribute to the military society, and because, in any event, those restrictions may be removed at some point, the grounds for the Court's subjecting purely gender-based distinctions to heightened scrutiny are not present here. Finally, as the extensive and vigorous congressional debate noted above demonstrates, the inclusion of women on the draft rolls is a matter requiring "sensitive policy choices" whose "resolution in a democracy" is best

left to the legislature. *Maher* v. *Roe*, 432 U.S. 464, 479 (1977).

II.

Even if the intermediate standard of *Craig* v. *Boren* applies, the male-only registration requirement passes constitutional muster because it is closely and substantially related to the important governmental interest of responding to a military emergency with maximum speed and efficiency.

A. It is well settled that the reasonableness of a statutory classification must be judged in light of the particular purpose served by that statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). The primary purpose of the recent reactivation of the registration process was to establish a mechanism "for early delivery of inductees in an emergency." S. Rep. No. 96–826, 96th Cong., 2d Sess. 156 (1980). Registration, thus, is the first step in the conscription process, which, in turn, serves to provide the Nation with an efficient means of responding to a military emergency. See *Falbo* v. *United States*, 320 U.S. 549, 553 (1944). Because registration is an integral part of the process of conscription, the constitutionality of the male-only registration must depend, as the district court purported to recognize (J.S. App. 21a), on the constitutionality of a male-only conscription.

B. The evidence before Congress, as well as the additional evidence adduced in this suit, established that a male-only draft is closely tailored to sound emergency defense policy. The thrust of the evidence before Congress was that the predominant need would be "for combat replacements from the induction system." S. Rep. No. 96–826, *supra*, at 158. More specifically, the principal demand for conscripts would be to replace casualties in the infantry, armor, combat engineering, field artillery and related specialties. *Id.* at 157–158. But these areas of need for the most part are closed to women under current law and policy. While all conscripts would not be assigned to combat positions, and while large numbers of categories of mili-

tary occupational specialties are open to women, the evidence before Congress demonstrated that in recent years more than sufficient numbers of women have been volunteering to staff those noncombat positions for which they are eligible. As then Army Chief of Staff General Bernard Rogers explained, "[t]here is an overstrength * * * in those types of functions [in which] our women would be found." *Hearings on S. 2294*, *supra*, at 1215.

Other evidence showed that the substitution of female for male conscripts could affirmatively impair defense efforts. Military flexibility requires the ability to rotate combat troops to noncombat assignments following periods of conflict and to transfer noncombat personnel into the war zone. *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 16 (1979) (testimony of General Rogers). The substitution of women for men in those noncombat positions would deny the armed forces that flexibility. Similarly, expert military testimony demonstrated that the timeliness of our mobilization and deployment rates would be critical to the successful outcome of our present day military strategies. Congress thus rationally determined that the Nation's ability to respond with maximum speed and efficiency would be compromised by having to pick and choose from among male and female inductees depending upon their eligibility for the assignments at hand because of combat restrictions. Congress was equally concerned that a military liability would be incurred by having to devote limited training facilities to conscripts ultimately ineligible for combat, close combat support, or combat rotation positions.

The district court believed that including women in the draft pool could only enhance the Armed Services' flexibility. But that conclusion is attributable to the fact that the court considered registration in isolation and, notwithstanding its statement to the contrary, failed to regard it as the first step in the conscription process. Thus,

although the exclusion of a large number of persons from an abstract registration roll might appear to detract from flexibility, the exclusion of combat-barred personnel from a finite pool of conscripts has the opposite effect. As one expert in military affairs opined, "the price you would pay" for this kind of substitution is "the decreased effectiveness of the overall force." Deposition testimony of now Army Chief of Staff General Edward C. Meyer (J.A. 264).

Ultimately, Congress concluded that substituting female for male conscripts not only would fail to enhance military preparedness, but, in fact, would detract from it by reducing the flexibility that the military requires to meet national emergencies. This decision was closely tailored to the important purpose of the Military Selective Service Act and thus plainly survives intermediate scrutiny. In reaching a contrary conclusion, the district court not only erred in reweighing *de novo* evidence that was for Congress to judge, but it essentially held that Congress may not provide an exclusionary registration system so long as it may be physically capable of structuring a dual combat/noncombat registration and induction scheme. This approach demands far too much of the "important governmental interest test" and, consequently, permits the judiciary to intrude into military matters that the Constitution expressly has entrusted to Congress.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ANALYZING THE GENDER-BASED CLASSIFICATION OF THE MILITARY SELECTIVE SERVICE ACT UNDER THE "SUBSTANTIAL RELATION TO AN IMPORTANT GOVERNMENTAL INTEREST" TEST RATHER THAN UNDER THE MORE DEFERENTIAL "RATIONAL RELATIONSHIP" TEST

A. The Rational Relationship Test Is Applicable To Gender-Based Classifications Arising In The Military Context

The Due Process Clause of the Fifth Amendment, like the Equal Protection Clause of the Fourteenth, prohibits invidious discrimination between similarly situated groups. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).[11] Ordinarily, a legislative classification will be upheld in the face of an equal protection claim if it bears a rational relationship to a legitimate state purpose. *United States Railroad Retirement Board* v. *Fritz*, No. 79–870 (Dec. 9, 1980), slip op. 2 (Justice Brennan, dissenting). A statutory distinction that implicates fundamental rights or suspect classifications such as race or religion, on the other hand, will be stricken in the absence of a showing of a compelling governmental interest that cannot be achieved by any less drastic means. *Dunn* v. *Blumstein*, 405 U.S. 330, 342–343 (1972). Further, this Court has articulated an intermediate level of scrutiny applicable to gender-based discrimination: the classification "must serve important governmental objectives and * * * must be substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Califano* v. *Westcott*, 443 U.S. 76, 85 (1979); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979); *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979); *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316–317 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 201–211 (1977); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

The present case, however, involves more than the equal protection component of the Fifth Amendment. It implicates as well Congress' powers under Article I, Section 8, of the Constitution, in the exercise of which the courts have afforded Congress wide latitude. As we show below, the broad deference due Congress when it legislates in the military context and the demands of equal pro-

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[11] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, *supra*, 377 U.S. at 168, quoting *Bolling* v. *Sharpe*, *supra*, 347 U.S. at 499.

tection can best be accommodated in this case by the application of the rational relationship test. Thus, while the Act's gender restriction withstands even the *Craig* v. *Boren* intermediate level of scrutiny (see pages 26–38, *infra*), the district court erred initially in applying that test, rather than the rational relationship test, which this Court previously has applied to statutory classifications tailored to the needs of national defense.

Much like the present case, *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), involved a gender-based classification based on national defense considerations. Under the provisions at issue in that case, commissioned male naval officers were subject to mandatory discharge for failing twice to be promoted within approximately 10 years of service, while female officers were afforded 13 years to obtain equivalent promotions. Although the Court previously had subjected gender-based discrimination to heightened scrutiny in, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (plurality opinion),[12] *Schlesinger* v. *Ballard* upheld the statute on the ground that there was a *rational basis* upon which Congress *may* have proceeded in applying disparate standards to male and female officers in view of military needs. 419 U.S. at 508.[13] In so holding, the Court relied on Congress' "broad constitutional power" to raise and regulate armies and navies (U.S. Const., art. I, § 8) and emphasized that "[t]he responsibility for determining how best our Armed Forces shall attend to" fighting and de-

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[12] See *Craig* v. *Boren*, *supra*, 429 U.S. at 197–199 (explaining that intermediate scrutiny had been applied, although not fully articulated, in previous cases).

[13] Justices Brennan, Douglas and Marshall, dissenting, criticized this analysis on the ground that "a legislative classification that is premised solely upon gender must be subjected to close judicial scrutiny," and because the majority had "conjure[d] up a legislative purpose which *may* have underlain the gender-based distinction here attacked" (419 U.S. at 511; emphasis by the Court). Compare *Califano* v. *Goldfarb*, 430 U.S. 199, 212–213 (1977) (only rationale actually relied on by Congress can support gender-based discrimination under middle-level scrutiny).

veloping readiness for fighting wars rests with Congress, and not with the courts. 419 U.S. at 510.[14]

Schlesinger v. *Ballard* exemplifies this Court's consistent recognition of the wide latitude that is due Congress in the exercise of its responsibility to raise and regulate military forces in defense of the Nation. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 757–758 (1975); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94 (1953). Judicial deference to the judgments of the coordinate branches is particularly warranted with respect to "[t]he complex, subtle, and professional decisions as to the composition,

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[14] Although the gender-based discrimination in *Frontiero* v. *Richardson* also arose out of a classification drawn by a military statute, that statutory classification was not related to military preparedness or to any other purpose so central to the military mission as to invoke the traditional deference that courts have accorded to military affairs. Rather, *Frontiero* involved the constitutionality of a scheme whereby a female member of the uniformed services could claim her husband as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits only if he in fact was dependent upon her for over one-half of his support, whereas a serviceman could claim his wife as a "dependent" regardless of whether she in fact was dependent upon him for any part of her support. 411 U.S. at 678. *Frontiero*, therefore, is more like the cases in which this Court has struck down disparate awards of social welfare benefits to male and female wage earners. See *Wengler* v. *Druggists Mutual Ins. Co.*, *supra*; *Califano* v. *Westcott*, *supra*; *Califano* v. *Goldfarb*, *supra*; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). Gender-based distinctions in the context of draft registration, on the other hand, are based on considerations central to the defense mission of the armed services and, therefore, are more like the classification involving the promotion and discharge of naval officers upheld in *Schlesinger* v. *Ballard*, *supra*.

We further note that the classification at issue in *Frontiero* applied not only to the armed forces, but to all members of the uniformed services, which included the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration and the Public Health Service. 411 U.S. at 768 n.1. The breadth of the classification demonstrates that it was not tailored to a central military mission and, therefore, that the traditional deference accorded to the military would not have been appropriately applied in that case.

training, equipping, and control of a military force." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). As the Court instructed in *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931), the Constitution empowers Congress to raise armies "[i]n express terms"; such authority "necessarily connotes the [plenary] power to say who shall serve in them and in what way." Thus, it would be inappropriate for a court to substitute its judgment for that of Congress in this area even "in the unlikely event that [it] possessed [the] requisite technical competence to do so." *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 8.[15]

The district court rejected the application of a deferential standard of review as only "superficially appealing" (J.S. App. 30a), concluding (J.S. App. 19a) that "the test to apply in determining if gender-based discrimination is constitutional should not vary from one factual context to another."[16] That conclusion, however, ignores not only *Schlesinger* v. *Ballard*, a decision of continuing vitality, but also the wholly consistent approach that this Court has taken in other constitutional cases arising in the military context.

For example, in *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), the Court held that the review standards which normally determine whether a statute is void for vagueness or overbreadth must be relaxed when the statute governs the "military society." In such circumstances,

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[15] See also *Bertelsen* v. *Cooney*, 213 F.2d 275, 277 (5th Cir.), cert. denied, 348 U.S. 856 (1954) ("It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed"); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979).

[16] Having so concluded, the court nonetheless went on to explain (J.S. App. 20a) that "[w]e are not here concerned with military operations or day to day conduct of the military into which we have no desire to intrude." As the district court itself recognized, however (Pet. App. 21a), registration cannot be considered independently of induction and, as we show at pages 31–36, *infra*, the induction of women would have a substantial (negative) impact upon the day to day conduct of the military.

"Congress is permitted to legislate both with greater breadth and with greater flexibility* * *." *Ibid.* Accordingly, the Court held (*id.* at 756–757) that the proper standard of review to be applied to a vagueness challenge to provisions of the Uniform Code of Military Justice is the standard applicable to criminal statutes regulating economic affairs. Similarly, in *Greer* v. *Spock*, 424 U.S 828 (1976), the Court, deferring to the military (see *id.* at 837–838), upheld the government's ban of political speech by civilians on military bases—a content-based restriction of a fundamental First Amendment right that would have been flatly impermissible in a nonmilitary context (see Justice Powell's concurring opinion). And, in *Brown* v. *Glines*, 444 U.S. 348 (1980), the Court upheld Air Force regulations that imposed a prior restraint on the First Amendment right to petition, without demanding of the government the "compelling interest" that would have been required to support a prior restraint in a civilian context. Finally, because of the paramount importance of national defense and the inherent latitude that attaches to the exercise of the war powers, the Court has approved Congress' decision to deny conscientious objector status to those opposed to participation in a particular war, rather than all wars, even if conscription of such an individual would violate a *bona fide* religious conviction. *Gillette* v. *United States*, 401 U.S. 437 (1971).[17]

The same considerations that warranted a deferential standard of review in the foregoing cases similarly require the application of the rational relationship test in the present case. Even a cursory review of the evidence demon-

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[17] Cf. *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (approving, in the interest of national security, the CIA's prior restraint on publication "that in other contexts might be protected by the First Amendment"). See also *Burns* v. *Wilson*, 346 U.S. 137 (1953) (although constitutional rights are not extinguished in military setting, the fact that control of the military is entrusted to Congress, not the civil courts, narrows the scope of habeas corpus inquiry); *United States* v. *MacIntosh*, *supra*, 283 U.S. at 622 (breadth of war powers permits Congress to take a wide variety of actions that would be constitutionally prohibited in non-defense contexts).

strates that national defense considerations and questions of military force composition and flexibility were at the heart of Congress' determination of whom to include in the draft registration rolls. Thus, by employing the intermediate standard of review adopted in *Craig* v. *Boren* and refusing to defer to Congress' judgment on the composition of the draft registration, the district court placed itself in the inevitable position of directing how the armed forces shall attend to the business of national defense. While disavowing the intention to do so (J.S. App. 20a), the district court itself sifted and reevaluated the evidence that had been before Congress on the issue of an all-male registration and draft, and concluded *de novo* that it was "unconvincing" (J.S. App. 23a). Relying on selective studies, the district court expressed its own view on advantages that might accrue from the height and weight differences between men and women, independently assessed the time-savings and deployment options that might be realized by using noncombat eligible women rather than combat-trained men, and even went so far as to discount Congress' conclusion that it is critical for all conscripts to be eligible for deployment into conventional combat and combat support roles on its unsupported (and contradicted; see page 30, *infra*) assumption that such use of troops "is probably less likely in this time of high technology warfare" (J.S. App. 28a n.18, 32a–35a & nn.23–26). Plainly, the district court's application of heightened scrutiny carried it into an area far beyond its "technical competence." *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 8.[18]

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[18] As this Court stated in *Vance* v. *Bradley*, 440 U.S 93, 111 (1979), quoting *Firemen* v. *Chicago, R.I. & P. R.R.*, 393 U.S. 129, 139 (1968), it was not for the district court "'to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that [it is] without convincing statistics in the record to support it * * *.'" This admonition applies with even greater force in this case where, as we show below, Congress' conclusions were based on a sound and substantial body of evidence.

The district court implicitly justified its independent factual conclusions on the ground that the Executive Branch itself had sought to

B. Heightened Scrutiny Is Also Inappropriate Here Because The Challenged Classification Is Based On Women's Uchallenged Ineligibility To Be Utilized In Combat, And Not On Gender Alone

Considerations in addition to the deference traditionally accorded Congress in its exercise of the war powers warrant application of a deferential review standard here.

1. *Schlesinger* v. *Ballard*, *supra*, also suggests that only the rational relationship test is applicable where the challenged classification is based on something more than the sex characteristic. In *Ballard*, the Court emphasized that the promotion period differential for male and female officers was not based on "archaic and overbroad" generalizations about women, but rather on the fact that female officers had less opportunity for promotion than did their male counterparts as a result of combat restrictions applicable only to women, which the appellees in that case did not challenge. 419 U.S. at 508. Here, Congress similarly based its decision to exclude women from the draft pool not on archaic or stereotypic notions about the role of women, but on the same statutory inability of women to be assigned to combat positions, also unchallenged by appellees herein.

At the present time, female officers and enlisted members of the Regular Navy and the Regular Marine Corps "may not be assigned to duty on vessels or in aircraft that are engaged in combat missions nor may they be assigned to other than temporary duty on vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions." 10 U.S.C. (Supp. II) 6015. Similarly, 10 U.S.C. 8549 prohibits the assignment of female members of the Air Force (except for, *e.g.*, physicians, dentists, and

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expand registration to include women and had presented evidence to Congress in support of that end. In the final analysis, however, the Constitution commits that decision, and its timing, to Congress. See U.S. Const., art. I, § 8.

nurses) "to duty in aircraft engaged in combat missions." While there are no statutory restrictions on the assignment of women in the Army, the Secretary of the Army determines where women may serve and, in conjunction with the Chief of Staff, develops policies and programs to employ Army women effectively. Current Army policy excludes female officers and enlistees from specialties and units that relate to close combat, *i.e.*, infantry, armor, cannon field artillery, combat engineer and low altitude air defense units of battalion/squadron or smaller size (J.A. 58).[19] In addition to the statutory prohibition against women serving on vessels engaged in combat, the Marine Corps, like the Army, as a matter of policy does not assign women to units whose primary mission is combat or to military occupations that are primarily associated with combat units (*ibid.*).[20]

Appellees expressly do not challenge the validity of the legal and policy restrictions on employing women in combat, close combat support and combat rotation roles,[21] and the district court thus correctly presumed those restrictions to be valid (J.S. App. 20a, 22a). Furthermore, as we show below (at 29–36), it was precisely because of these

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[19] Army women are assigned, however, to combat support and combat service support units in divisions, including maintenance battalions, signal battalions, brigade level headquarters and certain artillery units (*ibid.*).

[20] The Senate Armed Services Committee expressly "reaffirm[ed]" "[c]urrent law and policy [that] exclude women from being assigned to combat in our military forces * * *." S. Rep. No. 96-826, *supra*, at 157.

[21] See, *e.g.*, statement of Donald Weinberg, counsel for appellees (J.A. 256):

> The question of whether a job should be open to females in time of war, and in time of threat, I am leaving firmly in the discretion of the Army. This is not what the suit is about, and it's a misapprehension that I think has been fostered in the papers of the defendants, and it totally misapprehends what the suit is about.
>
> We do not seek to say that you have to put women in combat, or you have to put them in close support, or you have to put them in a helicopter or anywhere else.

combat restrictions on women that Congress determined *not* to call for their registration and induction. Thus this case, like *Ballard*, is more properly viewed as involving a distinction between combat eligible and combat ineligible persons (see note 22, *infra*), as to which nothing stricter than the rational relationship test need be applied.

Similarly, in *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 & n.20 (1974), this Court held that because a state disability insurance program's exclusion from coverage of disabilities related to pregnancy was based not on gender *per se*, but rather on the additional condition of pregnancy, it was subject to review under only the rational relationship standard. Analogously, in the present case, women—like the substantial percentage of men who are ineligible for combat assignment and are released from draft obligations at the classification stage—are excluded from the draft pool on the basis of the statutory disability imposed on the female sex. Cf. *Parham* v. *Hughes*, *supra*, 441 U.S. at 355-357.[22]

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[22] Appellees have objected (Motion to Affirm 19) that "[a]ll young men, fit or unfit, but no women however fit to serve, are compelled to register for potential conscription into the Armed Forces." But, of course, those men who are ineligible for combat assignment—including not only the "halt" and the "blind," as appellees put it (*id.* at 46), but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus equally excused from "conscription into the Armed Forces," *id.* at 19 (with the exception that conscientious objectors who are not opposed to participation in noncombat service will be inducted for assignment to such service; 50 U.S.C. App. 456(j)). This has always been the case historically, even during periods of declared war, when the stringency of physical induction standards are relaxed pursuant to 50 U.S.C. App. 454(a). Ideally, one would excuse all those unfit for combat from registration as well. But that is not practical. Classification is in essence a statement of availability for immediate induction. It has thus been deferred until after the issuance of induction notices because, at least in some cases, the physical and mental conditions of registrants are subject to change, and the evidence demonstrated that it is most efficient to presume all males combat-capable until classification. See *Hearings on S. 2294*, *supra*, at 1827 (testimony of Dr. Rostker); *Presidential Recommendations*, *supra* (J.A. 51-54). On the other hand, since every woman is prohibited by law and policy

2. Moreover, because the exclusion of women from the registration requirement is due to their ineligibility to fill combat positions, the usual reasons for applying heightened scrutiny to gender-based classifications do not apply here. In articulating a standard that subjects legislative classifications based purely on gender to heightened scrutiny, this Court was influenced by the facts that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," and that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 686 (footnote omitted).

In contrast, in light of the unchallenged combat restrictions that affect only women, the sex characteristic bears a very definite relationship to a female's ability to perform and contribute in the military context. Furthermore, the combat restrictions, which account for the challenged classification, are hardly immutable. If and when they are removed, an amendment to the registration provisions of the Act can follow. Intervention on constitutional grounds thus is not required.[23]

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from combat assignment, it would have made no sense for Congress to require the registration of women in the first place in view of its goal of conscripting only persons capable of combat assignment.

[23]There is more than an abstract possibility that the combat restrictions on women could be lifted at some future date. The Department of Defense has sought the full repeal of legislatively imposed restrictions on the assignment of women to combat positions in the Navy (10 U.S.C. (Supp. II) 6015 and the Air Force (10 U.S.C. 8549). See *America's Volunteers—A Report on the All-Volunteer Armed Forces* (Dec. 31, 1978) (J.A. 88). Indeed, Section 6015 recently was amended to permit Navy women to be assigned to "hospital ships, transports, and vessels of a similar classification not expected to be assigned to combat missions." Pub. L. No. 95-485, Title VIII, Section 808, 92 Stat. 1623. In the Army, where combat prohibitions are maintained as a matter of departmental policy, the possibility of expanding the availability to women of combat-related occupational specialties has been

3. Finally, the composition of the draft pool has been the subject of a vigorous congressional debate. See note 7, *supra*. The compulsory inclusion of women in a draft registration also has been a focal point of the pending Equal Rights Amendment. See, *e.g.*, S. Rep. No. 92-689, 92d Cong., 2d Sess. 13-14 (1972); *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208 and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971). "[W]hen an issue involves policy choices as sensitive as [these] * * *, the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe*, 432 U.S. 464, 479 (1977) (public funding of nontherapeutic abortions). For this reason as well, the appropriate accommodation of the demands of the military with the requirements of equal protection is the application of the rational relation test.

4. As we show below, the all-male registration requirement is substantially related to the important governmental interest in effectively and efficiently meeting a national military emergency. Plainly, therefore, it survives scrutiny under the rational relation test. Indeed, the

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the subject of testing and study. See *America's Volunteers*, *supra* (J.A. 87); Office of the Secretary of Defense (Manpower, Reserve Affairs, and Logistics), *Use of Women in the Military* (2d ed. 1978) (J.A. 100). There is additional evidence to be obtained and digested, however, and the Army is moving cautiously because of the significant implications for national security. *Use of Women in the Military*, *supra* (J.A. 106, 108) ("[t]here are still many unanswered questions * * *" and we must "err on the side of national security").

As this Court noted in *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 510 n.13, that Congress itself may eliminate the restrictions that underlie the challenged classification is further justification for the courts to defer to the legislature. At the time *Ballard* was decided, the Department of Defense had submitted a bill to Congress that would have eliminated the differential treatment of women that was challenged in that case. In upholding the classification under a rational basis approach, the Court stated: "These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the [military] policy goals sought to be served by [the statute] are no longer necessary." *Ibid.*

courts of appeals that have been faced with challenges to the Military Selective Service Act on gender discrimination grounds uniformly have applied the rational relation test and upheld the exclusion of women from registration and induction as rationally related to the purposes of the Act. See *United States* v. *Reiser*, 532 F.2d 673 (9th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Baechler*, 509 F.2d 13, 14-15 (4th Cir. 1974), cert. denied, 421 U.S. 993 (1975); *United States* v. *Camara*, 451 F.2d 1122, 1126 (1st Cir. 1971), cert. denied, 405 U.S. 1074 (1972); *United States* v. *Fallon*, 407 F.2d 621, 623 (7th Cir.), cert. denied, 395 U.S. 908 (1969).

II. THE GENDER-BASED CLASSIFICATION OF THE MILITARY SELECTIVE SERVICE ACT IS SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENTAL INTEREST

A. The Constitutionality Of An All-Male Registration Depends On The Constitutionality Of An All-Male Draft

It is well settled that the reasonableness of a statutory classification must be judged in light of the purpose served by the statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). As discussed at page 3, *supra*, the registration and conscription provisions of the Military Selective Service Act are interlocked. There can be no conscription without registration. And, as the district court correctly pointed out (J.S. App. 21a),

> [r]egistration of a class of citizens with absolutely no purpose would be unconstitutional under any standard of review. The imposition of the burden to register upon any class of citizens must be justified. The justification here should relate to the governmental need to raise military forces by conscription. We can consider the registration only in light of its justification.

Specifically, the purpose of Congress' reinstitution of registration procedures at the present time was to "provide[ ] the means for early delivery of inductees in an

emergency." S. Rep. No. 96-826, 96th Cong., 2d Sess. 156 (1980). The constitutionality of the all-male registration thus must be determined, under *Craig* v. *Boren*, by reference to whether it serves substantially to satisfy the Nation's emergency conscription needs. See *Falbo* v. *United States*, 320 U.S. 549, 553 (1944) (dominant objective of the Act is to "raise an army speedily and efficiently").[24]

But while the district court initially recognized that the constitutionality of an all-male registration is dependent on the constitutionality of an all-male draft, it soon lost sight of its own conclusion. Thus, in rejecting the factual basis of Congress' perception of military needs, the district court accorded great weight to the testimony of the then members of the Joint Chiefs of Staff in favor of registering women. J.S. App. 39a & n.30, 37a. However, while the Joint Chiefs had no objection to *registering* women (*Hearing on S. 109 and S. 226*, *supra*, at 10-11), they uniformly were of the view that there was no military need to *draft* women (see pages 31-32, *infra*). It is the

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[24] In advocating repeal of the Act's gender restriction, representatives of the Executive Branch had urged Congress to require all women to register and to leave the decision of how many women—if any—actually would be conscripted to be made at some later date, on the basis of the military needs at that point. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1674 (statement of Mr. Simms). Congress, however, in a rational exercise of its statutory powers, insisted on linking registration procedures to what the evidence showed would best, and most efficiently, satisfy induction needs. See *Hearings on S. 2294*, *supra*, at 1670 (comments of Principal Deputy Assistant Secretary of Defense Danzig) ("The purpose of registration is to equip us with information so that if we had a national mobilization, we could move more quickly to achieve our wartime personnel requirements with greater effectiveness"), 1197 (comments of Senator Warner) ("I equate registration with the draft * * *"), 1195 (comments of Senator Jepsen) ("If women are not going to be called into combat and assigned combat duty, then it seems logical to me that they not be drafted. So why register them?"). See also deposition testimony of Dr. Rostker (J.A. 246) (the purpose of the "revitalization" of the registration process was "to provide a firm basis on which the Selective Service could respond in a national emergency to the manpower requirements forwarded to [it] by the Secretary of Defense or by the Assistant Secretary of Defense for Manpower").

latter testimony that is meaningful when registration is properly regarded as a first step in the conscription process. A review of this and other evidence presented to Congress, the most significant of which was that the drafting of women, in fact, would be to the *detriment* of military preparedness, demonstrates that Congress' decision to limit the draft pool to men is substantially related to the important governmental interest in meeting effectively the Nation's emergency military needs.[25]

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[25] In evaluating the basis for drafting only men, the district court correctly considered the extensive legislative history underlying Congress' recent decision against amending the draft provisions of the Military Selective Service Act to include women (see note 7, *supra*). In their Motion to Affirm (at 4, 36–37), appellees contended that the constitutionality of the male-only registration must stand or fall solely on the basis of the reasons articulated by Congress when it enacted the Military Selective Service Act in its "modern form" in 1948; and that the reasons and conclusions expressed in the Report of the Senate Armed Services Committee in 1980, S. Rep. No. 96–826, 96th Cong., 2d Sess. 154–164 (1980), must be dismissed as afterthought which played no actual part in the enactment of the exclusionary registration provisions. First, as shown at pages 14–26, *supra*, the classification at issue is properly judged under the "rational relationship" test, and thus may be sustained on the basis of any set of factors on which Congress may have relied. See *United States Railroad Retirement Board* v. *Fritz*, No. 79–870 (Dec. 9, 1980), slip op. 11; *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959). In any event, the findings and conclusions articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were part of a comprehensive reexamination of the registration and draft issues in view of current military needs, and followed lengthy hearings on the President's proposal to amend the Act and expand draft registration to include women. These findings culminated in the current defense authorization act, Pub. L. No. 96–342, 94 Stat. 1077, which, in conjunction with H.R.J. Res. 521 (limiting the transfer of funds for registration to the amount necessary to register males), rejected the President's proposal to register women. See S. Conf. Rep. No. 96–895, 96th Cong., 2d Sess. 100 (1980). This legislation thus essentially constitutes a reconsideration and reenactment of the gender-restricted draft registration, and it is therefore appropriate—indeed, necessary—that its history be taken into account in evaluating the basis for that restriction.

B. Given The Current Prohibitions On Assigning Women To Combat, The Exclusion Of Women From The Draft Pool Is Substantially Related To Meeting Effectively The Nation's Emergency Military Needs

1. *The evidence before Congress showed that in a national military emergency, the primary demand on the induction system would be for combat troops, positions for which women, concededly, are ineligible*

The evidence presented to Congress established that if an emergency draft were required, the primary demand on "the induction system" would be for "combat replacements" to alleviate shortfalls in the volunteer forces. S. Rep. No. 96-826, *supra*, at 158. See *id.* at 154-155, 160; S. Rep. No. 96-226, *supra*, at 2-3, 6; *Hearing on S. 109 and S. 226*, *supra*, at 24, 54 (statements of then Army Chief of Staff General Bernard Rogers). Expert military testimony during the March 1980 hearings before the Senate Armed Services Committee typically was to the effect that "our requirement for registration is based on large numbers of men to replace casualties." *Hearings on S. 2294*, *supra*, at 1528-1529 (testimony of Marine Corps Lieutenant General Edward Bronars); accord, *id.* at 1395 (testimony of Principal Deputy Assistant Secretary of the Army William D. Clark) ("your immediate and very evident demand is going to be first to fill up the kinds of units that have to be deployed early, with an added demand for the replacement of casualties").

While the district court relied, *inter alia*, on its own assumption (J.S. App. 32a n.23) that only a small percentage of conscripts would be required for combat roles, the Committee heard evidence that, in the event of mobilization, approximately two-thirds of the demand on the induction system would be for combat skills. *Hearings on S. 2294*, *supra*, at 1390 (testimony of Lieutenant General Robert G. Yerks, Army Deputy Chief of Staff for Personnel). See deposition testimony of Major General R. Dean Tice, Deputy Assistant Secretary of Defense (J.A. 282)

(the "bulk of your requirements in war time certainly go into combat and combat support skills. You know as a function of expansion, the ratio of the logistical or administrative support certainly doesn't increase at the same rate as combatants do in war time").

Indeed, high level military personnel who testified in this case were of the view (contrary to the unsupported assumption of the district court; see J.S. App. 32a n.23) that developing methods of warfare employed by the United States and its allies would require *more* combat intensive forces than those that had been required during past military conflicts. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1390 (deposition testimony of Lieutenant General Robert G. Yerks, Army Deputy Chief of Staff for Personnel); testimony of Army Chief of Staff General Edward C. Meyer (J.A. 262-263) (as shown by the Yom Kippur War, future wars are likely to result in increased losses of manpower and material); deposition testimony of Army Deputy Chief of Staff Lieutenant General Harold G. Moore (J.A. 252) (Army is attempting to "increase the teeth and reduce the tail").

But it is those combat positions, and, in particular, those combat positions in which the most critical shortages are expected to arise, that are closed to women. As explained in S. Rep. No. 96-826, *supra*, at 157-158:

> Only 6 percent of the enlisted skills in the Army are closed to women as a result of the exclusion of women from combat. But these include infantry specialists, armor specialists, combat engineers and positions in field artillery and air defense. It is in these skills, and more specifically in the very large number of positions needed to be filled in infantry and armor skills, where mobilization manpower is so severely short. It is also these skills that are most difficult to recruit for during peacetime. The Personnel Chiefs of the Army and Marine Corps, for example, testified that it is in these combat skills where the All-Volunteer Force has failed to supply sufficient recruits, and where current strengths of combat units is [*sic*] often woefully inadequate. In peacetime, although only 6 per-

> cent of Army enlisted skills are closed to women, fully 42 percent of all billets [assignments] filled by enlisted personnel in the Army are in specialties, skills or units not available to women. These include noncombat positions in close support units that could come under enemy fire. [26]

Appellees do not challenge (see page 22 & n.21, *supra*) current law and policy that exclude women from assignment to combat and, in the view of the Senate Armed Services Committee (S. Rep. No. 96-826, *supra*, at 157), that exclusion was "the most important reason for not including women in a registration system."

2. *Not only is there no need to draft women to staff noncombat positions, but the exclusion of women from those positions substantially serves the important governmental interest of flexibility in meeting a national military emergency*

a. The consistent testimony before Congress was to the effect that there is *no military need* to draft women. Although the then members of the Joint Chiefs of Staff acknowledged that a certain number of women conscripts could be accommodated to satisfy political concerns of equity (*Hearing on S. 109 and S. 226*, *supra*, at 15),[27] they uniformly advised Congress that, given combat restrictions, emergency military needs would not require the induction of women. *Id.* at 11, 14 (testimony of then Army Chief of Staff General Rogers) ("I am not prepared to

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[26] Throughout the testimony, this latter point was reiterated: that the percentage of job *categories* open to women is substantially higher than the percentage of *jobs* open to women, because the few categories from which they are excluded, *e.g.*, combat soldiers, are relatively populous. See, *e.g.*, *Hearings on S. 2294*, *supra*, at 1679 (testimony of Mr. Danzig). This differential would, of course, expand during a period of mobilization.

[27] The thrust of the relevant testimony was that the Armed Forces would be capable of absorbing 80,000 women out of a total pool of 650,000 inductees (the total number called for under the model European crisis mobilization scenario used by the Defense Department in making draft projections) within the first six months following mobilization. *Hearings on S. 2294*, *supra*, at 1661, 1828 (statements of Mr. Danzig).

agree that [women] should be drafted as of today, even for those skills for which they are today being utilized"), 14–15 (testimony of Air Force Chief of Staff General Lew Allen, Jr.) ("the Air Force now is able to meet its recruiting objectives for women with well qualified women. We would anticipate that in a period of draft, the Air Force would continue to meet its objectives in both men and women through volunteers. Therefore, we would not need a draft in order to meet the objectives that we have for both men and women"), 15 (testimony of Chief of Naval Operations Admiral Thomas B. Hayward) ("there would not be a requirement for women to be drafted at all to meet our wartime needs"), 15 (testimony of Marine Corps Commandant General Louis H. Wilson) ("I am sure that we can get volunteers as mentioned by the other Services"). Indeed, as then Army Chief of Staff General Bernard Rogers testified, "[w]e are at 103-percent strength [of women] in our Army Component * * *. There is an overstrength in service support manpower and it is in those types of functions that our women would be found * * *." *Hearings on S. 2294, supra*, at 1215.[28]

The district court viewed Congress' exclusion of women from the draft as inconsistent with the increase in the number of women volunteers that have been accepted into the Armed Forces over the past several years. J.S. App. 37a–38a. On the contrary, the increase in female volunteers has obviated the military need to draft women for

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[28] Appellees' reference (Motion to Affirm 10 n.17) to General Rogers' testimony (*Hearing on S. 109 and S. 226, supra*, at 14) that the Army was experiencing a 25% shortfall in recruiting women in fiscal year 1979 is misleading. First of all, the testimony was offered well before the close of the fiscal year on September 30, 1979. Second, appellees' reference ignores the general thrust of the testimony concerning the abundance of female volunteers, and, in particular, General Rogers' own contemporaneous testimony (*ibid.*) that "[t]his is a change * * * because prior to this year, we had no difficulty in filling our recruiting objectives for female soldiers." Finally, it ignores current Pentagon statistics that show that every service except the Army met or exceeded female recruitment needs in fiscal 1980, and that the Army met 95% of its quota. *Military Manpower Strength Assessment, Recruiting and Reenlistment Results for Fiscal Year 1980* (Oct. 31, 1980).

the occupational specialties from which they are not excluded (see statements of Joint Chiefs of Staff, *supra*). At the present time, there are approximately three times the percentage of women in the Army as there were during the peak of World War II (*Use of Women in the Military, supra*, (J.A. 153–154), and the number of women volunteers is projected to increase still further.[29] Indeed, expansion has been closely controlled by the Armed Services precisely to avoid exceeding the point of diminishing returns in emergency preparedness,[30] despite the fact that women have proven easier and more cost-effective to recruit than men. *Use of Women in the Military, supra* (J.A. 107–109, 133, 144–145).

Nor were these views of the military lost on Congress. As Representative Holt observed,

> [The conscription of women] is going to create numbers that you can't handle. There is no way in the world that you can take a percentage of women * * * and another percentage of men and try to sort out. You are going to be getting more volunteer women than you can possibly use in support roles.

Hearings on National Service Legislation Before the Subcomm. on Military Personnel of House Comm. on Armed Services, supra (J.A. 227–228).

The evidence before Congress thus demonstrated that expanding the draft to include women would not serve the overriding military need for combat and close combat support replacements, and that positions in which noncombat eligible women could be used in the event of a national emergency were already staffed by an abundance of volunteers. Congress acted in an eminently reasonable fashion,

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[29] See S. Rep. No. 96–226, *supra*, at 8; *Hearing on S. 109 and S. 226, supra*, at 48; *Presidential Recommendations, supra* (J.A. 57); *America's Volunteers, supra* (J.A. 82) ("more women want to enlist than are now accepted").

[30] See generally *Use of Women in the Military, supra*, including "Preface to Second Edition" (J.A. 99–104) and J.A. 154 ("the growth must be watched to ensure that the fighting capacity of the Army is strengthened, not weakened by additional enlisted women").

therefore, in refusing to amend a statute, whose primary purpose is to fulfill emergency defense needs, in a manner that would not address those needs.

b. Not only is there no need for a female draft to staff the noncombat positions, but the staffing of such positions with drafted women would detract from the flexibility necessary for an effective military response to a national emergency in a number of significant ways.

i. "In peace and war, significant rotation of personnel is necessary. We should not divide the military into two groups—one in permanent combat and one in permanent support." S. Rep. No. 96-826, *supra*, at 158. The rotation that is required is of two different types. First, the military must have available noncombat positions into which it routinely can transfer, or "rotate", combat personnel following their involvement in extended periods of conflict. When rotation is required, those previously staffing the noncombat positions are rotated into the positions held by their replacements. *Ibid.* This military necessity has resulted in very large numbers of noncombat positions being restricted to men—all of whom are combat trained and eligible regardless of actual assignment—even in the peacetime volunteer forces. See *Use of Women in the Military*, *supra* (J.A. 124-125); deposition testimony of Lieutenant General Moore, *supra* (J.A. 255-256).

A second aspect of the rotation requirement is the historically demonstrated need for the capability to "reach back" into the noncombat ranks during exigent circumstances. As then Army Chief of Staff General Rogers explained:

> One thing which is often lost sight of, Senator [Nunn], is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks in an emergency; that is, to hand them a rifle or give them a tanker suit and put them in the front ranks.
>
> * * * * *

> Now, if that support base and that operating base to the rear consist in large measure of women, then we don't have that opportunity* * *.

Hearing on S. 109 and S. 226, supra, at 16.[31]

Thus, although not all conscripts would necessarily be placed in combat or rotation positions, their use in such positions is always a possibility. This consideration alone justifies Congress' decision to register only those who would be combat eligible. Cf. *Vance* v. *Bradley, supra*, 440 U.S. at 106–107 (State Department may impose blanket retirement age for all foreign service officers because "all of them are subject to assignment to" physically demanding foreign posts, irrespective of actual likelihood of such assignment).

ii. Congress also was concerned with the delay that might result from the Armed Services' inability to deploy 100% of a finite number of conscripted trainees to a combat or restricted rotation zone. In that context, the Senate Armed Services Committee stated (S. Rep. No. 96–826, *supra*, at 158) that "there are other military reasons that preclude very large numbers of women from serving. Military flexibility requires that a commander be able to move units or ships quickly." And as Admiral Hayward explained (*Hearing on S. 109 and S. 226, supra*, at 72):

> The national strategy for a conventional conflict is heavily dependent on mobilization and deployment rates.
>
> Timeliness of mobilization and deployment, and our ability to sustain the flow of manpower and material to the theater of conflict, are factors critical to the success of the strategy.

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[31] This point was vividly illustrated by the deposition testimony of Deputy Assistant Secretary of Defense and former European Division Commander Major General Tice (J.A. 281):

> During the Battle of the Bulge in 1944, whether you were already in or about to be drafted, everybody immediately went into combat, because it was critical we turn out all combat individuals. We even retrained all the clerks and cooks in France and sent them to the front line.

> Any inability of the Selective Service System to ensure the timely flow of forces to the war places the outcome of our strategy in serious question, and our national security in jeopardy.

Another military expert testified that "rapid deployability [is] our most urgent single need" and that present military strategies depend upon "greater flexibility to move forces rapidly from one theater to another and to tailor them for particular contingencies. * * * In other words, we would like to have a more *flexible*, more modern, more survivable force, before we need a bigger force." *Hearings on S. 2294, supra*, at 1233 (testimony of Under Secretary of Defense for Policy Robert W. Komer) (emphasis added). While the avoidance of delay might not provide a constitutional justification in another context, it is, indeed, a compelling governmental interest when troop deployment is involved, particularly where the statutory concern itself is for "mobilizing national manpower in the shortest practicable period * * *." See Falbo v. *United States, supra*, 320 U.S. at 554.

iii. Finally, Congress was of the view that devoting limited training facilities to noncombat eligible troops could have a critical, negative impact, particularly during periods of crisis. Marine Corps Commandant General Wilson advised the Senate Armed Services Committee that war efforts would be more constrained by limitations in "training capacity" than by personnel shortages. *Hearing on S. 109 and S. 226, supra*, at 73. General Rogers similarly testified that "[i]t is necessary to plan to keep the military training establishments filled to capacity in any situation requiring full mobilization." *Ibid.* Such testimony provided a firm basis for the Committee's conclusion that "[p]rocessing and training would be needlessly burdened by women recruits who could not be used in combat. If more people can be processed, they should also be directed to the combat positions which need to be filled." S. Rep. No. 96-226, *supra*, at 9.[32]

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[32] While the latter comment was made in the context of an assumption that men and women would be drafted in equal numbers, it ob-

c. The district court concluded (J.S. App. 43a) that the exclusion of women from the draft "is the antithesis of 'flexibility.'" However, while "women plus men" superficially might appear to enhance flexibility on an abstract registration role, the substitution of women for men in a finite pool of inductees subject to emergency deployment produces the opposite results described above. As Army Chief of Staff General Meyer summarized it, "the price you would pay [for conscripting females] would be the decreased effectiveness of the overall force" (J.A. 264). The evidence adduced during the hearings afforded Congress a sound basis for reaching the same conclusion.[33]

Thus, Congress concluded that substituting female for male conscripts not only would fail to enhance military preparedness, but, in fact, would detract from it by reducing the flexibility that the military needs to meet national emergencies. Because Congress' conclusion was not only rational, but closely and substantially related to the Act's critical purpose of "mobilizing national manpower in the shortest practicable period" with maximum effectiveness, *Falbo* v. *United States*, *supra*, 320 U.S. at 554, it passes constitutional muster even under the intermediate test of *Craig* v. *Boren*, *supra*.

In order to reach the contrary conclusion, the district court not only independently reweighed the evidence that

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viously applies as well to the extent that limited facilities would be devoted to the training of any number of women, who would not be eligible to staff combat positions, to the exclusion of men, who would be available for assignment wherever the military deemed them to be needed.

[33] Congress also noted that problems would arise in areas such as housing, but it considered these matters "less important than [the] military reasons" for not expanding registration and induction to include women. S. Rep. No. 96-226, *supra*, at 9. While the Senate Armed Services Committee also took into account the societal impact and perception of the registration and possible induction of women, it emphasized (S. Rep. No. 96-826, *supra*, at 157) that "[t]he policy precluding the use of women in combat is, in the committee's view, the most important reason for not including women in a registration system."

was Congress' to judge, but, moreover, it acted on the flawed presumption that an exclusionary system would be unacceptable if Congress were capable of tailoring registration and induction efforts into combat and noncombat pools, and thus conceivably achieving emergency preparedness "by less drastic means."[34] But this approach fails to distinguish between the "substantial relationship" test of *Craig* v. *Boren*, *supra*, and the strictest standards that this Court has applied only to statutory classifications implicating fundamental rights or suspect classifications such as race or religion. Compare *Dunn* v. *Blumstein*, 405 U.S. 330, 342-343 (1972), and *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17 (1973), with *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 n.20, 335 (1977) (state prohibition on female guards in all-male correctional institutions violates neither Title VII of the Civil Rights Act of 1964 nor the Equal Protection Clause of the Fourteenth Amendment where there is a "basis in fact" for anticipating that the employment of women in such positions would pose institutional security problems). This failure is particularly pernicious in the present case, where it results in the judiciary's intrusion into military matters that the Constitution expressly has entrusted to Congress.

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[34]Congress, on the other hand, believed that war is not a time for "an experiment * * * with unknown risk[s] * * *." S. Rep. No. 96-226, *supra*, at 9.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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No. 80-251

IN THE

Supreme Court of the United States

October Term, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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FURTHER STATUTORY PROVISIONS INVOLVED[1]

The entire Military Selective Service Act ("MSSA"), 50 U. S. C. App. §§ 451-473, is reproduced in the Joint Documentary and Stipulated Record (R. 77-127). The principal provisions of the MSSA were summarized by Appellees at page 4 of the Motion To Affirm Judgment ("Motion To Affirm") filed herein, and will not be repeated here. Arguments made for the first time in the Brief For The Appellant ("App. Br.") require citation of the following additional provisions of the MSSA:

Section 4(a) of the MSSA, 50 U. S. C. App. § 454(a), provides, at ¶ 3 (not included in the portion of that section reproduced in App. Br. at 2-3), that the minimum standards for physical acceptability for induction in time of war or national emergency shall not be higher that those applied to persons inducted between the ages of 18 and 26 in January 1945. That same Section 4(a) provides at ¶ 6, also not included in the Brief For The Appellant, that every person conscripted into the Armed Forces shall be given full and adequate military training for a period of not less than twelve weeks before he is eligible for assignment in any foreign land.

COUNTER-STATEMENT OF THE CASE AND INTRODUCTORY STATEMENT

This case involves registration for a possible draft, not the draft itself. It presents the question of the constitutional validity of the categorical exclusion of all females from Selective Service registration. There is no factual record on, and the District Court did not consider, the constitutionality of excluding women from certain combat roles and that issue is not properly raised in this Court.[2] The District Court did not decide whether, in the

1. The Question Presented, List of Parties, Opinion Below, and Citation of Jurisdictional Provision in the Brief For The Appellant are adequate.

2. Throughout the Brief for the Appellant, the Government suggests that Appellees have conceded the legality of the so-called combat exclusion for women. Appellees do not concede the con-

event of a draft, men and women would have to be drafted in equal numbers, randomly, or in some particular ratio, or even if women would have to be drafted at all, and those issues, therefore, are not before this Court.

A comprehensive statement of facts and evidence and of the relevant military and Congressional history from the enactment of the MSSA in 1948 to the present has already been set forth in Appellees' Motion to Affirm at 4-18, 40-46, and will not be repeated here.

Appellant makes no attempt to rebut in his Brief the legal and factual points made in Appellees' Motion to Affirm. Appellant has instead shifted ground and raised entirely new arguments, distorting the record and the issues, and making incorrect and misleading factual assertions. First, Appellant has consistently, until now, recognized that the total exclusion of all women from, and the inclusion of all men in, Selective Service registration in Section 3 of the MSSA is a gender-based classification. In his Brief in this Court, Appellant argues for the first time that the classification at issue is between combat-eligible and combat-ineligible persons. This is factually incorrect. Men are registered regardless of their combat eligibility, solely because of their sex; women are not registered regardless of their combat eligibility, solely because of their sex. In fact, combat-ineligible men are frequently drafted,[3] and women are not ineligible for all combat roles.[4] Thus, sex is not a true proxy for combat eligibility, and combat

2. (Cont'd.)
stitutionality of the combat exclusion, but submit that it is irrelevant to a resolution of the present case. Appellees have consistently contended that male-only registration is unconstitutional even assuming limitations on women in combat. Appellees emphasize, as did the District Court, that the question of assignment limitations under any future hypothetical set of circumstances is irrelevant to the very different question of who should register today.

3. See Section I(A), *infra*, at 8-11.

4. See Section I(A), *infra*, at 11-13.

eligibility is not a prerequisite to registration or conscription for males.

Second, Appellant now argues that the MSSA was in effect re-enacted in 1980.[5] Appellant has consistently failed to address the legislative history of the MSSA from 1948 to the present, and now looks for support to certain litigation-inspired and post-litigation statements accompanying funding legislation. Congressional commentary in 1980 is uninformative with regard to Congressional intent in enacting the MSSA in 1948 and in amending it thereafter.[6] *International Brotherhood of Teamsters v. United States,* 431 U. S. 324, 354, n. 39 (1977).

In sum, the Brief for Appellant literally redefines the case. Therefore, Appellees will respond to the new arguments, legal and factual, raised by Appellant for the first time in this Court and respectfully incorporate herein and refer the Court to the Motion to Affirm for full discussion of those issues raised and litigated prior to the submission of the Brief for the Appellants.

SUMMARY OF ARGUMENT

Goldberg v. Rostker[7] was tried by all parties as a gender discrimination case. For nearly a decade all parties acknowledged what is self-evident, that the requirement of Section 3 of the MSSA that all males and no

5. App. Br. at 28, n. 25.

6. In the FY 1981 Defense Authorization Bill, Congress simply appropriated funds—but did not re-enact the MSSA. Any consideration of the registration of women was undertaken solely for the litigation-inspired purpose of *post-hoc* rationalization. See, Section II(D), *infra.* The focus of H. R. J. Res. 521 was the emergency funding of a "vitally necessary" (App. Br. at 5) registration plan which, under existing law, excluded women. Extensive legislative history reveals that, at the time of the passage of the MSSA, the basis for excluding women from conscription was a sex-stereotypical view of their proper role minding home and hearth. *See,* Motion to Affirm at 4-6, and not an analysis of their ability to serve in the military. Jur. St. 23a, n. 15.

7. Civil Action No. 71-1480 (E. D. Pa.).

females register for possible conscription is a classification based upon sex. On appeal Appellant urges that, notwithstanding his prior position, there is another, unspoken basis of classification—combat eligibility.

The Record is clear, however, that the registration provision of the MSSA does *not* classify by combat eligibility. Thousands of combat-ineligible males are registered and, even more so in war than in peace, may be conscripted into the Armed Forces.[8] At the same time, volunteer servicewomen who meet the medical qualifications for their Military Occupational Specialties ("MOS") have been and increasingly are accepted into positions which have traditionally been thought of as combat roles.[9]

There are no statutory prohibitions upon assignment of women to combat duty in the Army, and only incidental restrictions in the other Services. Limitations upon assignment are, and would be for most draftees, entirely a matter of Service policy—which Appellant admits is flexible. A statutory bar on female registration cannot be justified as a short-hand way of excluding women from combat assignments, for which men are sometimes ineligible and women are sometimes eligible; nor can it be said accurately to reflect existing statutory or policy restrictions on female assignments.

Appellant asserts a non-gender-based classification in order to avoid scrutiny of male-only registration under the standard enunciated in *Craig v. Boren*, 429 U. S. 190

8. In wartime, the general standard of fitness for conscription must, by statute, drop below combat fitness. MSSA, 4(a), 50 U. S. C. App. § 454(a). Doctors and other medical professionals are subject to induction, in war or peace, without regard to fitness for combat, and, of course, are ineligible to fight by virtue of their assignment as doctors, corpsmen, and the like. Conscientious objectors who decline only combat roles (Class I-A-O) are similarly draft-eligible, but combat-ineligible.

9. *E.g.*, Lance and Pershing Missile Crews. American Servicewomen have for years earned hostile fire/combat pay and combat awards in their duty assignments. Section I(A)(2), *infra*; J. A. 186(5).

(1976), and similar precedents. Those cases impose on the Government the burden of demonstrating a close and substantial relationship between the gender classification and an important purpose actually contemplated by the statute. The District Court found that the classification contained in registration under Section 3 was indisputably gender-based, and thus held that *Craig* was controlling. Appellant has offered no evidence which could justify overturning that finding as doubtful, much less "clearly erroneous." *United States v. General Dynamics Corp.*, 415 U. S. 486, 508 (1974).

Appellant's claim that a lesser, more deferential standard of review should be applied in this case because of its tangential military character is likewise unpersuasive and unsupportable. This Court has consistently rejected the argument that legislation enacted under the power to raise armies or other war-power-related clauses is subject to lesser Equal Protection scrutiny than other laws, and the decisions according military authorities unusually wide latitude over matters of internal military regulation and governance are clearly inapposite.

Appellant places his principal reliance on findings generated by the Senate Subcommittee on Manpower and Personnel in April of 1980, since prior history is so "totally unhelpful in defense of male-only registration." J. A. 220. Although those findings were irrelevant to the F. Y. 1981 Defense Authorization Bill, S 2294, by June, they were urged by the Senate conferees on S 2294 and ultimately adopted by the House and Senate conferees in August 1980.[10] In arguing that S 2294, enacted as P. L. 96-342, is a "reconsideration and reenactment" (App. Br. at 28, n. 25) of Section 3's all-male registration provision, the Government ignores the rule that substantive law is neither repealed nor amended by committee reports or by

10. By which time, this case was already on appeal to this Court and the issue of female registration was no longer before Congress.

general funding legislation. *TVA v. Hill*, 437 U. S. 153, 190-193 (1978).[11]

Appellant argues that there is no military necessity to draft women; we can defend the country with a male-only draft. That rationale misses the mark in two ways. First, discrimination may not be justified by demonstrating that *non-discrimination* is unnecessary to the statutory purpose. The burden is on the government to establish a close and substantial relationship between discrimination and the statute's legitimate and articulated goal. Second, the military utility of *registering* women for the Nation's inventory of potential military personnel and skills, and for possible use in any contingency, is not negated by demonstrating that some hypothetical situations could be handled with a male-only *conscription*.[12]

In short, Appellant has presented nothing in or out of the Record which would support overturning the judgment of the District Court in this case.

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11. If anything, the District Court granted excessive deference to this post-hoc, post-litigation Congressional history in requiring plaintiffs to produce "overwhelming evidence" to rebut those belated findings. Jur. St. 20a.

12. In fact, even under the only concrete hypothetical considered in the Brief For The Appellant, current Defense Department plans call for women, including female draftees if available, to play an integral and vital role in the Nation's defense. Section II(A), *infra*.

Until submission of the Brief For The Appellant, male-only registration had been defended in this case primarily as enhancing "military flexibility." Jur. St. 28a-43a. That argument was refuted in the Motion To Affirm at 39-46. Unable to deal with the fact that every member of the Joint Chiefs of Staff testified *in favor* of registering women for strictly military reasons, Appellant has culled, mostly from Congressional transcripts, a few references to testimony of military leaders purportedly supporting Appellant's position. What is most striking about the new citations is that *every one* of those witnesses testified in *favor* of, or worked to implement, the registration of women under the MSSA. See Section II(C), *infra*.

ARGUMENT

I. All-Male Registration Under the MSSA Is Properly Subject to the Intermediate Tier of Scrutiny.

A. Section 3 of the MSSA Is a Purely Gender-Based Classification.

This is a sex-discrimination case. The Government admitted that in its Answer to Complaint[13] and proceeded on that basis through trial.[14] That concession was duly noted by the District Court. Jr. St., 12a, 43a. Appellant now argues in this Court that Section 3, which requires *all* males and *no* females to register for military service, has for 32 years been a carefully considered—but unarticulated—classification between the combat-eligible and the combat-ineligible.[15] Appellant's new assertion that gender is dispositive of all questions of combat eligibility and that the classification is based not on gender but on eligibility for combat is factually indefensible. See, *infra*, at 8-13. But even if there were a closer correspondence between sex and combat eligibility, that correspondence would be relevant only to the proffered *justification* of the classification, not to a determination of the appropriate standard of review. Adoption of Appellant's position would effectively eliminate intermediate scrutiny for explicitly gender-based classifications in all cases where the Government could assert any minimally rational basis, no matter

13. R. 13, filed on July 31, 1974.

14. *See* Defendants' Reply Brief on Burden of Proof, at 2 (June 24, 1980) ("It is not disputed that Section 453 contains a gender-based classification."). At trial, counsel for defendants stated, "Undoubtedly the Military Selective Service Act creates a gender-based distinction because males but not females are subject to registration and conscription thereunder." Trial Transcript, July 1, 1980, at 68. *See* also, *Id.*, at 70.

15. App. Br. at 11, 21-26.

how stereotypical or overly generalized, other than sex itself for the classification.[16]

1. Men Are Not Inducted or Rejected for Induction Based Upon Combat Fitness; Nor Are Women Uniformly Prohibited From Combat.

Appellant incorrectly asserts that only males fit for combat may be inducted, and that those who are unfit join the unregistered women as draft-ineligible.[17] That assertion is an *ipse dixit*, offered without support. Actually, by statute, men may be inducted in time of war or national emergency even though they are not "combat fit", so long as they are "expected to be productive in the military establishment". Army Regulation 40-501 ("AR 40-501"), Medical Services, Standards of Medical Fitness, Sec. 1-2(e).[18] Further, male doctors and male nurses may be inducted in war and peace alike without regard to combat fitness, so long as they may be expected to perform in their specialty. AR 40-501, Ch. 8-3.[19] Similarly situated women have never been drafted, and, as long as they are not registered, cannot be drafted. Although women have tradi-

16. For example, the Appellant's most recent analysis would have changed *Craig v. Boren* into a case where a statute which separated males from females would have to be scrutinized as one differentiating merely between high-risk and low-risk drivers, because there was some correlation between gender and drunk driving arrests. 429 U. S at 199-204.

17. App. Br. at 23.

18. AR 40-501 was not introduced at trial because it was not relevant to any justification for male-only registration offered at that time. For the convenience of the Court, Appellees file herewith one copy thereof, as amended through September 15, 1980.

19. "Allied Medical Specialists" is a broad term, including not only doctors, but, e.g., *registered nurses*. 32 CFR § 1622.15 (R. 151). There is considerable irony, and unfairness, in a system under which male nurses are conscripted as privates, while female nurses enter service voluntarily and then only as officers.

tionally dominated the nursing field, and now constitute a substantial proportion of our young doctors, even the "doctors draft" was for men only.[20] Moreover, as Appellant concedes, conscientious objectors not opposed to non-combat service illustrate yet another example of a substantial group of men who are ineligible for combat, but who are nonetheless registered and inducted by the thousands in wartime while similarly situated women are not.[21]

The heart of Appellant's argument is the assertion that:

> "[W]omen—like the substantial percentage of men who are ineligible for combat assignment and are released from draft obligations at the classification stage—are excluded from the draft pool on the basis of the statutory disability imposed on the female sex". App. Br., at 23.

The Government puts its case more graphically in a footnote:

> "[T]hose men who are ineligible for combat assignment—including not only the 'halt' and the 'blind,' as appellees put it (*id.* at 46), but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus

20. Both the statutory power to induct (except for those previously deferred) and authorization for a separate "doctors draft" lapsed in 1973. Present regulations continue to provide for the deferred classification of medical professionals in Classes I-AM and I-AOM. 32 CFR §§ 1622.15, 1622.17, (R. 151). A doctors' draft could be reinstituted by the same legislation which would authorize the induction of registrants generally. Appellee Goldberg is a physician who has never been subject to conscription and would be subject to a "doctors draft".

21. App. Br., at 23, n. 22. *See* also, Bureau of the Census, Department of Commerce, *Statistical Abstract of the United States*, 1978, No. 613; 1976, No. 542 (R. 1805).

equally excused from 'conscription into the Armed Forces.'" *Id.*, at n. 22.

The argument is factually false as to both men and women since, in time of war or national emergency, the physical standard for induction *drops* from "combat fit"[22] to "expected to be productive in the military establishment"[23] as a matter of direct statutory requirement.[24] Chapter 6 of AR 40-501 governs inductibility in mobilization,[25] and Appellant's statement that "the flatfooted as well [are] ultimately stricken from the induction rolls," App. Br. 23, n. 22, is exposed thereby as fantasy.[26] In wartime, the flatfooted *are* inductible, and they are inducted despite the fact that they are *not* combat-eligible. As one's medical rating falls, one becomes unacceptable for combat, but still acceptable for a diminishing set of non-combat duties until, finally, one is unacceptable for service at all.[27] Combat fitness does not mean availability

22. AR 40-501, Sec. 9-5 (Chart, Code B).

23. AR 40-501, Sec. 1-2(e). At the same time, AR 611-201 which sets medical standards for assignments, does not reduce the guideline for wartime assignment to the combat positions currently closed to women.

24. Section 4(a) of the MSSA requires that, in time of war or national emergency, "minimum standards of physical acceptability . . . shall not be higher than those applied . . . in January 1945".

25. The only time there will be inductions under the present registration.

26. The defects of the lower extremities which disqualify a man for service under Section 6-11 of AR 40-501 are double amputation, loss of toes rendering the individual "unable to perform useful military service", certain conditions of the feet (not including flatness) "which would prevent the wearing of a military shoe", and internal derangement of the knee "so disabling as to prevent gainful civilian endeavor".

27. Deposition of Major General R. Dean Tice, at 26 (R. 1653). Deputy Assistant Secretary of Defense General Tice described the six-part "PULHES" medical rating system at R. 1650-53.

for transfer to any combat position. It only means qualification for *some* combat positions. Even in peacetime, not every male inductee is eligible for duty as an infantryman.[28] Combat unfit or ineligible simply does not mean draft-exempt.

Appellant's proclaimed "statutory inability of women to be assigned combat positions," App. Br., at 21, is similarly unrelated to reality.[29]

Statutorily, both sexes are equally fit for combat in the Army. For the Army, which typically makes the greatest use of draftees in wartime, Congress abolished all statutory restrictions on assignments for women in 1978. 92 Stat. 1627, repealing 10 U. S. C. § 3071. Jur. St., at 38a, n. 28. The only remaining assignment restrictions by gender in the Army are matters of Army policy and relate only to "close combat" positions—meaning certain positions in those maneuver battalions whose mission is to close with and destroy enemy units. Statement of Assistant Secretary of Defense Robert Pirie, J. A. 210;

28. A current copy of AR 611-201, which lists the specified PULHES Physical Profile for each Military Occupational Specialty (MOS) as part of the description of each MOS, is submitted herewith for the convenience of the Court.

In time of war, test score levels down to "3" (*i.e.*, unfit for combat) are acceptable for induction. See AR 40-501, Ch. 6, 9, esp. §§ 9-3 and 9-7. In peacetime a PULHES profile of all "2's" or better is required for induction. Some combat positions, such as Pershing Missile Crew Member (MOS 15E) permit scores of "2" in all categories other than the Psychiatric. AR 611-201, at 3-13-19. Thus a profile with no score below "2" is rated "combat fit". However, such combat fitness *does not* mean availability for transfer into the most common close combat position, the infantryman (MOS 11B). For most close combat billets, such as infantryman, only scores of "1" on every PULHES factor meet Army qualification standards. AR 611-201, at 3-11-6.

29. Despite his contrary assertion, Appellant concedes the point by admitting that there are no statutory gender restrictions applicable to combat positions in the Army, and few elsewhere, App. Br., at 22. *See,* Motion To Affirm at 14-15.

Decision Memorandum: Subject: Combat Exclusion Definition for Women, J. A. 185-187.[30] Women must pass the same physical examination as do men, in war or in peace, to enter the Armed Forces. AR 40-501, Chapters 2, 6. Thus, medically, both sexes are equally fit for combat in all Services. Secretary Brown described the Army situation in 1978 as follows:

> "In the Army, women are now assigned to all units except infantry, armor, cannon field artillery, combat engineers, and low altitude air defense artillery units of battalion/squadron size or smaller and in all military occupational specialties except those concentrated in such units. For example, women are assigned to combat support and combat services support units in divisions, including maintenance battalions, communications battalions, brigade level headquarters, and certain artillery units." J. A. 175.[31]

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30. As Army Chief of Staff General Rogers advised all units on March 3, 1978:

> "Qualified women now have the opportunity to serve in all but a few specific combat units and combat specialties. In availing themselves of that opportunity women, like their male counterparts, must accept the responsibility for sharing all risks and enduring all hardships inherent in their specialty . . . Women are an essential part of the force. They will serve in the skills in which they have been trained." J. A. 173.

31. Secretary Brown testified to Congress on April 1, 1979 that "if men are registered, women ought to be too," with any decision as to conscription abiding the uncertain circumstances of that event. J. A. 181-82.

He had previously informed Congress that:

> "A servicemember in combat is authorized to receive combat/hostile fire pay and earn combat awards. Women have received hostile fire pay and combat awards in past conflicts. Women have served in combat in many skills during World War II, Korea, and Vietnam. Army nurses have served in combat for over a hundred years, although they and other medical personnel are considered noncombatants. Since the word 'combat' has historically been used to include such a

It is clear, then, (1) that combat ineligible men are not draft-exempt and (2) that women are not and have not been categorically excluded from all combat. *See* also, Motion to Affirm at 14; Statement of Harrison Wellford, et al., March 19, 1980. J. A. 206, at 207. The purported equivalence of male/female with combat-eligible/combat-ineligible is unproven because it is untenable.

2. That Women May Be Ineligible to Serve in Some Combat or Combat-Related Positions Might Be Offered to Satisfy—But Cannot Be Adduced to Avoid—Intermediate Scrutiny of Male-Only Draft Registration.

Section 3 of the MSSA is explicitly and without exception classification by gender, and it distributes the benefits and burdens of registration and conscription strictly by sex. This Court has declined to apply intermediate scrutiny to classifications that have a differential impact as between men and women, and are based on characteristics positively correlated with gender, *only* where such classifications neither rely *expressly* on gender, nor operate to distribute benefits and burdens *solely* on the basis of gender. *See Personnel Administrator of Massachusetts v. Feeney,* 442 U. S. 256 (1979) (state law limiting benefits to veterans not subject to intermediate scrutiny; gender not the criterion, and denial of benefits to *non-veterans* left out many men as well as nearly all women);[32] *Geduldig v.*

31. (Cont'd.)

broad range of activities, the Department of Defense does not believe that the term provides a useful basis for expanding the opportunities for women in the service." J. A. 174.

32. Male-only registration harms the exempted women as well as the registered men. *Feeney* illustrates the lifelong loss of opportunity suffered by the vast majority of women as a result of their exclusion from registration for the draft. A substantial proportion of the men benefitting from veteran's preferences were draftees; only the few women permitted to volunteer accrued similar benefits.

Aiello, 417 U. S. 484 (1974) (state disability insurance program excluding *pregnancy* from conditions covered not subject to intermediate scrutiny; gender not the criterion, and group disadvantaged does not include *all* women, while group benefited includes women as well as men). The initial male/female dichotomy of treatment in the statutes challenged in *Schlesinger v. Ballard,* 419 U. S. 498 (1975), did not apply where the sexes enjoyed equal opportunities for assignments. 419 U. S. at 509. The male-only draft registration provisions of the MSSA, by contrast, *automatically* exempt *all* persons of one gender, and *none* of the other, from a burdensome requirement or legal disability, even where men and women are similarly situated, *i.e.,* some of both are combat-ineligible and some are combat-eligible, but most of both are useful in achieving "an adequate armed strength"—the purpose stated in Section 1(b) of the MSSA.

This Court has never considered such a statute, which expressly classified on the basis of sex, as anything but a gender-based classification; it should not do so for the first time here.

Appellant argues that this Court should apply only the most minimal scrutiny to the MSSA's male-only draft registration provisions "because the challenged classification is based on women's unchallenged ineligibility to be utilized in combat, and not on gender alone." App. Br. at 21. Even assuming *arguendo* women's "ineligibility to be utilized in combat", a point which Appellees indeed challenge, pp. 11-13, *supra,* and Appellant himself refutes, App. Br. at 22, and n. 19, what Appellant invites the Court to do here would be unprecedented and unjustified. This Court has never avoided applying intermediate scrutiny to an absolute gender-based classification merely because the challenged classification *also* tracks some facially gender-neutral characteristic—in this case, allegedly, combat ineligibility. That more combat and combat-related positions may be open to men than to women might be advanced to *justify* male-only draft registration under in-

termediate scrutiny, but that difference in eligibility has utterly no bearing on the level of scrutiny to be applied to the classification.

Consideration of a condition other than gender which correlates identically with gender—a condition that might plausibly explain, and ultimately justify, a classification's explicit reliance on gender—has always been a part of the *process* of intermediate scrutiny. Identification of such a condition is not, and should not become, a means of avoiding such scrutiny. That a gender classification may to some degree reflect social, economic, or legal circumstances did not escape this Court's notice in *Reed v. Reed,* 404 U. S. 71 (1971), (more men than women may be financially sophisticated); *Stanton v. Stanton,* 421 U. S. 7, 14 (1975) (gender correlated with need for education and training); *Craig v. Boren,* 429 U. S. at 199-204 (1976) (gender correlated with drunk driving); or *Orr v. Orr,* 440 U. S. 268, 280-81 (1979) (gender correlated with need). But such correlations between gender and *other* human conditions, although perhaps making the line between men and women minimally "rational" in each of those cases, were held to be insufficient to render any of those classifications "substantially related to an important government interest," *Craig, supra,* 429 U. S. at 197—and were *certainly* insufficient to obviate the need to demonstrate that substantial relationship.[33]

Were the Court to accept Appellant's invitation, intermediate scrutiny would be applied only in cases where nothing *but* gender could be advanced to justify a chal-

33. The nature and extent of the correlation between gender and some other condition might on occasion enable gender to *satisfy* the demands of intermediate scrutiny. *Semble, Dothard v. Rawlinson,* 433 U. S. 321, 32-37 (1977) (gender as possible bona fide statutory job qualification under equal employment statute; no constitutional point considered). But using such a correlation to satisfy intermediate scrutiny after a searching analysis is a far cry from deploying it at the threshold to *avoid* such scrutiny altogether. *See,* App. Br. at 21-26.

lenged classification by sex. But those few cases are the very ones in which not even a test of minimal rationality would be met. Intermediate scrutiny, developed and applied by this Court in a long line of decisions, would be relegated to those cases in which it would be unnecessary to the result. Whenever gender was argued to stand as a surrogate for any other trait, we would retreat to minimal scrutiny, overruling a decade of decisions in the process. Gender classifications should be reviewed as such, and made to stand or fall on the closeness and substantiality of the relationship between such discriminations and an important statutory purpose.

B. That This Case Involves a Challenge to the Exclusion of Women From Registration Does Not Justify a Lower Standard of Review.

Appellant has argued that, because this case arises in a military context, the gender-based classification in question should be measured under a lower standard of review than the heightened scrutiny normally accorded to gender-based classifications. There is no basis for any such lowering of the standard of review applicable to gender-based Equal Protection cases.

1. There Is No Military Exception to the Standard of Review Otherwise Applicable in Cases of Explicit Gender-Based Classifications.

(a) There Is No Exception to the Relevant Standard of Review Based Upon the Source of Legislative Power.

This Court has never related the standard of review in an Equal Protection case to the clause of the Constitution pursuant to which a challenged statute was enacted. To the contrary, this Court has consistently stressed the dangers of granting undue deference to legislation simply because it was based on the national defense clauses of Article I, Section 8. Since at least 1866, and

consistently with respect to virtually every national crisis since the Civil War,[34] this Court has recognized that:

> "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Association v. Blaisdell,* 290 U. S. 398, 426, 78 L. Ed. 413, 422, 54 S. Ct. 231, 89 ALR 481 (1934)."

United States v. Robel, 398 U. S. at 263-64.

Adoption of Appellant's position would result in a dangerous and open-ended precedent.[35] If the power to raise armies or to wage war justifies a lower standard of review for gender classifications it would justify a lower standard for racial classifications as well. Even a registration law excluding blacks might be permissible on the ground that minorities are already over-represented in the armed forces, thus making it unnecessary to draft them and "rational" not to. Similarly, a legislative mandate or authorization to re-segregate units in the Armed Forces

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34. *E.g., Ex Parte Milligan,* 71 U. S. 125 (1866); *Hamilton v. Kentucky Distilleries and Warehouse Company,* 251 U. S. 146, 156 (1919) (Brandeis, J., for a unanimous Court), ("The War power, like other powers and like the police power of the states, is subject to applicable constitutional limitations."); *United States v. Cohen Grocery Co.,* 255 U. S. 81, 88-9 (1921); *Youngstown Sheet & Tube Company v. Sawyer,* 343 U. S. 579, 587 (1952); *United States v. Robel,* 398 U. S. 258 (1967).

35. The District Court noted:

> "It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible constitutional violations committed by the Congress or the executive in exercising war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of citizens and therefore may be the one most in need of an appropriate check and balance." Jur. St. 19a.

might pass muster as a "rational" response to racial incidents in integrated units. The history of Due Process/Equal Protection cases in this Court precludes any such reliance on mere rationality. Indeed, the "strict scrutiny" of racial classifications was first enunciated in a war powers case, *Korematsu v. United States*, 323 U. S. 214, 216 (1944).[36]

(b) There Is No Exception to the Relevant Standard of Review Based Upon the Impact of the Classification on the Military.

Just as the source of legislative authority does not affect the standard of review, this Court has never ruled that the standard of review accorded to a gender-based classification will be lowered because a challenged classification has an impact on the military. As discussed more fully in Appellees' Motion to Affirm at 23-32, Appellant's reliance on *Schlesinger v. Ballard* to establish the contrary is entirely misplaced and is totally undermined by *Frontiero v. Richardson*, 411 U. S. 677 (1973).

2. Any Exception to the Relevant Standard of Review for Classifications Directly and Substantially Affecting the Internal Operations of the Military Would Not Affect This Case.

Even if classifications which affect only military personnel and which govern important internal operations of the military could plausibly be judged by a more lenient standard than all other gender-discriminations, male-only registration under the MSSA could not thereby be saved

36. The Government argued in *Korematsu* not only that the exercise of the war powers was reasonable but that the classification was not actually based on race, but "other considerations 'making' the ethnic factor relevant" (Brief of Appellee, United States, p. 26). The argument that the instant case does not involve the gender line clear from the face of the statute thus has a history of rejection in this Court.

from heightened scrutiny. Persons called upon to register are, by definition, civilians. It is no mere technicality that the Selective Service System is not part of the Department of Defense, MSSA, § 10, 50 U. S. C. App. ¶ 460, and that its funds are appropriated directly to it as an independent agency. Selective Service regulates the conduct of the civilian population, not of military personnel. Even the *impact* of registration on the military is only indirect and attenuated: Selective Service merely creates the pool of those who are available to serve, a pool from which the military specifies quotas of conscripts according to its needs. Ultimately, it is the military services which decide in what capacity draftees will serve.

Finally, as the Motion to Affirm explains, at 32-34, the cases cited by Appellant involving the relaxed scrutiny of First Amendment claims by persons in the military or on military bases are clearly inapposite—not simply because none are Equal Protection cases, but, most crucially, because all involve matters *internal* to the military.

Thus, even if this Court were suddenly to overrule *Frontiero* and radically alter *Schlesinger* by lowering the equal protection standard applied *within* the military, such a ruling would still be inapplicable to this challenge to a law which operates only on members of the civilian population.

II. Male-Only Registration Is Not Substantially Related to Any Important Governmental Interest

A. Whether An All-Male System Could Meet Military Needs Is Irrelevant.

Appellant defends Section 3 of the MSSA on the grounds that there is no present military need to draft, and hence to register, women. App. Br., at 27, 31-34. However, as the Department of Justice informed Congress:

> "the question of military necessity for drafting women is irrelevant to the Constitutional issue." Testimony

of Deputy Assistant General Lawrence Sims, March 19, 1980 (R. 920-21).

Senator Cohen, dissenting from the rejection by the Subcommittee of S 2440, the proposed amendment to the MSSA which would have permitted female registration, stated two pertinent questions:

> "No one who has addressed the issue of constitutionality has adequately addressed the following question: If the Department of Defense states it can accept 250,000 women by 1985, if mobilization occurs at that time, and if we have an insufficient number of women volunteers for those positions, what is the rational basis for drafting men for those noncombat positions?" R. 885, reprinted at S. Rep. 96-826, at 242.
>
> "The question should be why women should not be registered, rather than why they should be. The burden of proof falls on those who would exclude women from this obligation. No convincing case for such exclusion has been made thus far." R. 886, reprinted at S. Rep. 96-826, at 242.

It is not Appellees' burden to prove that registering or drafting women is necessary to the proper function of the MSSA. If that were Appellees' burden, all prior Equal Protection decisions of this Court would be brought into question; in each the challenging party would have to show that *elimination* of the offending classification was necessary to an important governmental interest. The imposition of such a burden goes far beyond even a "rational basis" test and would endow even facially discriminatory legislation with a nearly irrebuttable presumption of validity. Whether or not an all-male (or all white or all black) pool of registrants or stream of inductees would be sufficient to meet military needs is constitutionally irrelevant. The burden must be on the Government [37]

37. Wengler v. Druggists Mut. Ins. Co., 100 S. Ct. 1540, 1546 (1980).

to demonstrate "an exceedingly persuasive justification to withstand a constitutional challenge." *Personnel Adm'r v. Feeney,* 442 U. S. at 273. It was for Appellant to prove at trial that the *exclusion* of women from the pool of persons potentially available for conscription under any circumstances—i.e., registrants—is closely and substantially related to the achievement of the purposes of the MSSA. MSSA, §§ 1(b), (c). This Appellant did not and could not prove.

As is demonstrated in greater detail at Section II(C), *infra,* the most effective possible mobilization, *even in the only hypothetical scenario considered by Appellant,* would be enhanced by the availability of women in the registration pool. A sudden, all-out war in Europe between NATO and the Warsaw Pact nations could well be as destructive and intense as Appellant suggests. App. Br. at 30. Conceivably, such a war could be decided within a matter of weeks or even days. In that worst-case scenario, the only case suggested in Appellant's Brief, the war could be decided *before the first draftee reached the front* because even with peacetime registration, no draftee could arrive in Europe until approximately the 110th day after mobilization. Hearings on FY 1981 Defense Authorization Bill, S 2294, at 1824, 1838 (Testimony of General Meyer). Section 4(a) of the MSSA requires, without exception, that every draftee "shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than twelve weeks" before he may be assigned for duty in any foreign country.

Who, then, would fight in such a hypothetical war? Assistant Secretary of Defense Robert B. Pirie testified that to meet a substantial shortage of combat troops in the Reserves, the support units in the United States would have to be "stripped down" to provide individuals already in the military as combat fillers; but to mobilize, train and equip an expanding force requires *supplementing* those

very support units.[38] The availability of women who would not require twelve weeks of training because they were not going overseas, "to fill those TDAs [service support units] spots [would] enhance the capability of the military to perform its function."[39] Because many of the skills required in those administrative, clerical, training and supply units would be skills already more concentrated in the female population than in the male, women could most efficiently be placed directly in the support units, thus freeing males for transfer.[40]

Appellant bore the burden to prove that registration of women would impede the accomplishment of the purposes of the MSSA. Yet the testimony of then Army Chief

38. Deposition of Robert B. Pirie, J. A. 266, 272-73.

39. *Id.*, J. A. 274.

40. As Assistant Secretary Pirie testified to Congress:

"The problem with the drafted man is that it takes twelve weeks of training to make that man employable. However, a woman who is drafted would require little, if any, training to move into a noncombat job to release a man who had previous training who was immediately deployable.

". . . it might take time to train a man whereas if you had a woman already trained in that noncombat skill that would be a plus". Testimony before the House Subcommittee on Military Personnel, March 5, 1980. J. A. 213, 240.

The District Court relied upon this testimony, in assessing the proffered justification of military flexibility and in describing actual plans for coping with the contingency of a European war. Jur. St., 32a-37a. Nor is any "special skills" draft needed to validate the District Court's reasoning. The skills available among inductees are examined and assignments made with those available skills and the needs of the military for those skills in mind. Hearings on S 2294, at 1684.

It is unfortunately true that societal pressures, including employment discrimination, have resulted in a situation where women, as a class, may be turned to for entry into clerical, administrative and similar support positions more quickly, and with less training, than men, as a class.

of Staff General Rogers typified the Record at trial and before Congress:

> "Women should be required to register in order for us to have an inventory of what the available strength is within the military qualified pool in this country." S. Rep. No. 96-226 (1979), at 14.

Appellant simply failed to prove that all-male registration is closely linked to the accomplishment of any purpose of the MSSA.

B. Whether Women Could Constitutionally Be Excluded From Various Conceivable Drafts or Combat Roles Is Immaterial.

Appellant concedes that, but for the *possibility* of ultimate conscription, military registration would itself be a pointless and hence unconstitutional deprivation of liberty. App. Br. at 26. And, but for the *possibility* of war, military conscription too would no doubt be unconstitutional. Only the omnipresent danger of war could justify the use of such drastic coercion in times of peace. But it will not do to run this logical sequence in reverse, as the Government seeks to do when it attempts to *reduce* the constitutionality of an all-male registration requirement to the validity of a hypothetical program for conscripting men only—and of doing so in circumstances where, by the Government's hypothesis, all conscripts are in turn assigned either by those specific combat posts presently closed to women or to posts in such continual rotation [41] with the latter that including anyone who would be in-

41. Appellant's "continual rotation" argument, if accepted, would justify excluding even *volunteer* women from the services. But both Congress and the military encouraged women to volunteer. If the presence of a volunteer woman who would not be rotated to a combat position will not destroy military flexibility, it is hard to understand how the presence of the same woman, in the same job—but as a draftee—would impair flexibility.

eligible for those posts would seriously impede needed military flexibility. *See,* App. Br. at 27-28.

If it could indeed be *guaranteed in advance* that conscription would be re-imposed by Congress *only* in circumstances where, and in a form under which, conscripts would all have to be trained for and assigned to special combat positions from which all women were categorically and justifiably [42] excluded, then it could at least be arguable that the registration of women would be a pointless imposition.[43] But no such thing *can* be guaranteed in advance. On the contrary, Appellant's concession that even in the European war scenario, only "approximately two-thirds of the demand on the induction system would be for combat skills," App. Br. at 29, means that at least one-third of the conscripts would be assigned to the positions admittedly open to women. Indeed, draftees have traditionally staffed non-combat, as well as combat, positions even in wartime. Jur. St. 33a; Hearings on S 2294, at 1834. In 1980, Army Chief of Staff General E. C. Meyer wrote to Congress complaining of "the already seriously understructured combat service support area." S. Rep. 96-826, at 227.[44]

42. Whether there could be *any* such circumstances and positions is not at issue in this case. *See,* n. 2, *supra.*

43. Even on that unlikely hypothesis, however, the registration of *all* men, rather than of only such men as could ultimately qualify for the hypothetical male-only combat posts, would impose on those men who could *not* ultimately qualify burdens both gratuitous and discriminatory because women identically situated would be spared such intrusion. It would be no answer in such a situation to say that it is "most *efficient* to presume all males combat-capable" at registration. Brief of Appellant at 23, n. 22 (emphasis added). *Reed v. Reed,* 404 U. S. at 76; *Stanley v. Illinois,* 405 U. S. 645, 656 (1972).

44. General Meyer also testified that drawing down the strength of support units could "destroy the effectiveness of follow-on combat formations [and] degrade the ability of the base to generate adequate trained manpower from the inductive pool once they come aboard." Hearings on S 2294, at 1817.

Of course, it is in combat service support roles, as distinguished from combat and combat support positions, that women have been most traditionally employed.[45]

Thus, far from a guarantee that any future draft would merely funnel registrants into all-male, close combat assignments, Appellant offers strong reason to believe that most, if not all, foreseeable conscriptions will *not* have that character at all. If a renewed conscription would be confined to men, the reason would not be the all-male "nature" of the *positions* for which conscripts would be needed and to which they would be assigned, but the all-male character of the present pool of *registrants* from which all conscripts would necessarily be drawn. MSSA, § 4(a), 50 U. S. C. APP. § 454(a). If only men will later be drafted, it is likely to be because only men are now being registered. Not even in a military context can the Government be permitted so blatantly to lift itself above constitutional challenge by its own bootstraps.

"[R]egistration is properly regarded as a first step in [*some*] conscription process," App. Br., at 28, but this means only that the Government must justify forcing upon all men, and no women, duties which are burdensome and intrusive in themselves and which expose *all* so burdened, and *none* unburdened, to the possibility of eventual conscription. That registration is properly so regarded does *not* mean, however, that a law discriminating by its terms between men and women at the registration threshold may be deemed justifiable so long as one can imagine *some* valid conscription program which would, in retrospect,

45. Senator Cohen made the same point:

"The requirements for combat soldiers will be high, but so will the requirements for the large numbers of military personnel who fill noncombat roles. What will happen if there are not enough women volunteers to fill those jobs designated for their service? Will we take male draftees who could fill combat positions and place them in non-combat positions and place them in non-combat positions intended for women?" R. 883-84, reprinted at S. Rep. 96-826, at 241.

make the current discrimination appear to have been functionally related to the program that emerged. Speculation on the look of the future cannot be invoked to erase the facial flaws of present law.

C. Military Flexibility Would Be Enhanced by the Registration of Women.

Ultimately the Government argues, as it must, that "the exclusion of women from the draft pool is substantially related to meeting effectively the Nation's emergency military needs."[46] The facts and argument presented at pages 8-23 and 39-46 of the Motion To Affirm set forth the clearly adequate, the indeed "overwhelming evidence",[47] which contradicts the purported combat flexibility justification for all-male registration. Jur. St. 20a-43a.[48]

As is conceded by Appellant, App. Br. at 32, n. 28, the Army fell 5% short of its fiscal 1980 female recruitment quota. The flow of volunteers even in peacetime is irregular and undependable,[49] and there has been a notable failure of the Services to attract expanded numbers of female volunteers in wartime.[50] Therefore, we cannot rely on volunteers to provide the 80,000 female inductees who "would be of overall benefit to the effective-

46. App. Br. at 29; *see, id.* at 29-38.

47. Jur. St. 20a.

48. Appellant criticizes the District Court for "reweighing the evidence" and for substituting its judgment for that of Congress. App. Br. at 37-38. That description does gross injustice to the role actually played by the three-judge court below. The District Court took a closely circumscribed view of its role. In selecting the intermediate standard of review for this gender-based classification over an argument for greater deference to Congress, the District Court conceded that "any judicial deference . . . due the Congress . . . should be extended in the determination of whether the standard is met, . . ." Jur. St. 19a.

49. Motion to Affirm at 10, n. 17.

50. Jur. St. 31a, n. 22, J. A. 111.

ness of a mobilization plan"[51] as and when needed in time of war. *Cf., Alexander v. Louisiana,* 405 U. S. 625, 639 (1972).[52]

Appellant's rhetorical notion that registering, drafting, or giving women important duties in time of war would be an unprecedented experiment,[53] is plainly wrong as a matter of world history and American experience. Registration and conscription of women are not novel experiments in modern society.[54] In World War II, the United Kingdom conscripted into non-combat positions in the armed forces 125,000 women, and registered another 9,600,000 women for possible service.[55] Both Canada and

51. Jur. St. 32a, J. A. 275-276.

52. Appellant now relies upon General Bernard Rogers' testimony on S 2294 that "[t]here is an overstrength * * * in those types of function that our women would be found," as support for the Appellant's argument that drafting, and thus registering, women is unnecessary because "more than sufficient numbers of women have been volunteering to staff those non-combat positions for which they are eligible." App. Br. at 13. However, General Rogers was not describing overall Army recruitment results. He was depicting the situation of peacetime duty assignments in his multi-Service European Command. Hearings on FY 1981 Defense Authorization Bill, S 2294, at 1215-16. Testimony on the point concluded with the question whether he favored the registration of women for the draft, General Rogers replied:

"I have always believed we should, yes, sir."

53. App. Br. at 38, n. 34.

54. Nor was the idea unheard of in ancient times. See Plato, *Laws, Book 7,* from the collected Dialogues of Plato (Hamilton and Cavins eds., 1961) at 1384 ("women must take their share in maneuvering, company drill, and grounding and shouldering of arms").

55. Kenneth J. Coffey, *U. S. Selective Service Manning the U. S. Armed Forces in a Post All Volunteer Era: The Historic Lessons of Conscription in the U. S. and Eight Other Countries.* ("Coffey"), 314-17. This paper was cited and relied upon by the Defense Manpower Commission and its staff. *E.g.,* Bulle, *The Historical Context of the Evolution of Current Manpower Policies,* in I Defense Manpower Commission Staff Studies (1976).

Australia required the registration of women during World War II. *Coffey,* at 320. Both the Germans and Russians drafted women in World War II, and deployed them advantageously in both combat and non-combat positions. *Id.,* at 289-93, 305-11.

In the United States, President Roosevelt submitted to Congress the Nurses Selective Service Act of 1945, proposing the *conscription* of twenty-thousand female nurses. Nurses Selective Service Act of 1943, H. Rep. 194, 79th Cong., 1st Sess. (1945). That Act passed the House of Representatives; and only the end of the war in Europe prevented the enactment of America's first female draft. Nurses For The Armed Forces, S. Rep. 130, 79th Cong., 1st Sess. (1945).

The lack of any consideration of registering women when the MSSA was enacted in 1948 and the Congressional state of mind which led to the reflexive omission of women from consideration are detailed at pages 4 through 6 of the Motion To Affirm. Also uncontested in this case is the fact that, with each periodic revision of the MSSA, in 1951, 1967, 1969, 1971 and 1973, there was no consideration or analysis of the exclusion of women from the draft. J. A. 292-293.[56]

Since 1948, the history of enacted legislation shows Congressional recognition of the suitability of women, in large numbers and over the broadest spectrum of roles, in the military. In 1967, during the Vietnam War, Congress removed the last statutory limitations upon the number or percentage of women in the Armed Forces. 81 Stat. 374, P. L. 90-130. This completed the acknowledgment by

56. Even in 1948, the available evidence supported a two-sex draft. For example, in connection with a different statute:

> "I am convinced that in another war [women] have got to be drafted just like men." General of the Army Dwight D. Eisenhower, Hearings on S 1614 Before The Subcommittee On Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess., No. 238 at 5563-64 (1948); see, Motion To Affirm, at 11-12.

Congress that the need for women, in raw numbers and in percentages, would increase "in time of war." S. Rep. 117, 82nd Cong., 1st Sess. 7 (1951); Motion To Affirm, at 12.

In the 1970's, Congress opened the service academies to women, integrated the Women's Army Corps into the Regular Army, and abolished all statutory combat restrictions on women in the Army. Motion To Affirm at 14. Those Acts, plus the consistent support found in funding the increasingly prominent role of women in the military, indicate a longstanding Congressional policy of encouraging the Armed Forces' development of gender-neutral criteria for service, and Congressional confidence in the judgment of the military in accomplishing that goal while enhancing and without ever denigrating the principal objective of providing the most effective and efficient possible defense capability.[57]

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57. At crucial points in his Brief, Appellant relies upon the deposition testimony of "Army Chief of Staff General Edward C. Meyer." App. Br. at 14, 37. General Meyer's deposition was taken on October 19, *1976,* prior to the Army's own field exercise tests, prior to most of its other experience with the expanded utilization of women (J. A. 99-102, R. 1088), and prior to the change in definition of combat in 1977 (J. A. 185-187). General Meyer noted the tentative and personal nature of his opinion in 1976 (J. A. 261, 262) and no similar testimony was elicited from him when he appeared in the FY 1981 Defense Authorization Bill hearings in 1980. Instead, he was Army Chief of Staff when the Services supplied the Defense Department with the goal of 80,000 female accessions in the first six months of a European War. J. A. 275-276.

Similar testimony cited by Appellant, such as that of Lt. General Moore in his October 14, 1976 deposition also must be taken in the context that all service plans for the optimal utilization of women fully consider the assignment and rotation constraints emphasized by Appellant. Jur. St. 42a, n. 31; Deposition of Lt. Gen. Moore, J. A. 252, at 253-54, 257. To the same effect, Appellant invokes Deputy Chief of Staff General Yerks for the combat-intensive nature of possible next wars. App. Br. at 30. But General Yerks was one of those who testified that because of the performance of women in the Army, and the added flexibility which their skills bring to the

On February 11, 1980, pursuant to a Congressional request for advice in P. L. 96-107 (1979),[58] the President recommended the inclusion of women in the MSSA registration pool. (J. A. 29-79). The primary reason for the recommendation was military utility,[59] with "the issue of equity" providing a secondary reason. (J. A. 59-61).

As related in the Motion To Affirm, at 15-18 and 40-45, both military and civilian defense officials testified uniformly in favor of registering women based upon the needs of the Nation and their proven ability to contribute to meeting those needs. Assistant Secretary of Defense, Robert Pirie, expressing the official Defense Department position, testified on March 5, 1980:

> "It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women . . . [Those women] should be available for service in the jobs they can do, just as men will be available for jobs they can do." (J. A. 212).

Similarly, while there could be "monumental strains" on training facilities if the law required women to be

57. (Cont'd.)

Army, he "would certainly favor registration of women." Hearings on S 2294, at 1389.

58. R. 259.

59. Hearings on S 2294, at 1854. "However, women can be used in large numbers in the peacetime and wartime force. Their presence could free more men for close combat jobs." J. A. 60. "[C]onsiderations of performance and equity" were presented in that order by Administration witnesses. *E.g.*, Statement of Messrs. Wellford, Rostker and Danzig, R. 867, at 891. Statement of Messrs. Pirie and Rostker, J. A. 209, at 210.

drafted in equal numbers with men, R. 881, it is clear that no such administrative problems would arise if the number of female inductees were set by the Department of Defense following the registration of men and women. J. A. 248, R. 1369-70.

Thus, precisely as required by the District Court, the "military flexibility" rationale for male-only conscription is "contradicted by Congress' own actions [and by] the overwhelming evidence on the record." Jur. St. 20a. There is, very simply, no military need to exclude women from registration because there is no inevitable need to exclude them from conscription. On the contrary, registration of women would plainly enhance military flexibility. Male-only registration is therefore irrational because it obstructs the very goals which it is said to serve.

D. The Statutory History of Congress' 1980 Funding Decisions Cannot Be Used to Support the Gender Classification Enacted in 1948.

The District Court took the Specific Findings of S. Rep. 96-286 as properly before it and found that those purported justifications of all-male registration failed completely to justify such gender discrimination. In according such weight to the 1980 statutory history, the District Court gave Appellant far more than his due. A reason for both the weakness of those justifications and their constitutional irrelevance, is discernible in the history of the Specific Findings and in long-established legal doctrine. The truth is that the arguments now offered to rationalize all-male registration consist entirely of litigation-inspired afterthoughts, none of which in fact occurred to, or was expressed by, the Congress that enacted the MSSA in 1948. Motion to Affirm at 6-8. It is nothing more than such afterthoughts to which Appellant alludes in its repeated references to "the evidence before Congress" supposedly justifying a male-only draft and male-only draft registration. *E.g.*, App. Br. at 10, 12, 13, n. 18, 23 n. 22, 28, 29, 33.

Evidently recognizing the inescapable force of this Court's precedents holding that such after-the-fact rationalizations are constitutionally inadmissible in defending laws classifying by gender,[60] Appellant now seeks to escape his own concession that no Congress prior to 1979 ever so much as *considered* whether to register women. J. A. 292-94, by adopting a curiously revisionist form of legislative history. Unable to rewrite the history of the 1948 law itself, Appellant attempts to rewrite the history of this case by suggesting, for the first time in the course of this litigation, that the law struck down in July 1980 and tested on appeal in this Court was *not* the 1948 law at all.

Appellant's argument is as tortuous as the legislative history which it seeks to amalgamate as its fictional "Military Selective Service Act of 1980." To unravel that argument, it is necessary to recount some of that history. The first piece of Appellant's fiction, H. R. J. Res. 521, merely transferred to Selective Service the funds ultimately used for, among other things, the 1980 registration, and was accompanied by a legislative record deliberately augmented by material chosen to be "helpful rather than hurtful in [this] litigation." J. A. 220-221. The second, P. L. 96-342, was the basic funding Act for all defense activities for 1981, and was actually enacted *after* the judgment below had been handed down. App. Br. at 28, n. 25.

After H. R. J. Res. 521 passed both Houses of Congress, the Senate Armed Services Committee rejected S 2440, the proposal to include women in the MSSA registrant pool, by a vote of 12 to 5. The Committee adopted the Specific Findings of its Subcommittee on which Appel-

60. *See, e.g., Califano v. Wescott*, 443 U. S. 76, 86-88 (1979); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648 (1975); *Cleveland Board Of Education v. LaFleur*, 414 U. S. 632, 653 (1974) (Powell, J., concurring in result). Even under a "rational basis" test, only "legitimate, articulated" governmental purposes may sustain a statutory discrimination. *San Antonio School District v. Rodriguez*, 411 U. S. 1, 17 (1974). Articulation thirty years after the fact is the same as no articulation at all.

lant so heavily relies. The Committee included those findings in its report on the pending Department of Defense Authorization Bill for FY 1981 (S 2294), S. Rep. No. 96-826, 96th Cong., 2d Sess. 160-61 (1980). On August 18, 1980, after the District Court had invalidated the male-only draft registration provisions of the MSSA, the House-Senate Conference Committee reported out the Defense Authorization Act for FY 1981. The Senate receded from its registration funding transfer provision as unnecessary because such transfer had already been "enacted in another law"—i.e., H. R. J. Res. 521. H. Conf. Rep. No. 96-1222, 96th Cong., 2d Sess. (1980). The House in turn agreed to incorporate the Specific Findings of the Senate Committee. On August 26, 1980, Congress adopted the FY 1981 Defense Authorization Act as P. L. 96-342. Thus, when Congress acted on P. L. 96-342, and when the conferees adopted the Specific Findings, initiated by the Senate Subcommittee in April 1980, they were the Congressional equivalent of *obiter dictum*, totally irrelevant to the enacted legislation.

At no point in this recent sequence of acts and omissions did Congress take a single step to *prevent* the expenditure of funds on the registration of women,[61] even after the decision invalidating male-only registration in

61. In debating H. R. J. Res. 521 in June 1980, the Senate and House each voted down on the floor an amendment that would have forbidden the use of transferred funds for registration in a sexually discriminatory manner. Since the MSSA had not been amended to permit registration of women, such a restriction would have prevented registration entirely. This was the only occasion on which the question of registering women reached the floor of either chamber—in debate over an amendment to a funding-transfer provision, not over any proposal to amend the MSSA itself. As the Senate Armed Services Committee emphasized "[t]he issue of whether women should be registered" is secondary to and only "confus[es] the real military issues—*i.e.*, the urgent need to reinstitute *some* draft registration. S. Rep. No. 96-826 at 157. The floor amend-

the District Court in this litigation, of which Congress had long been aware.[62]

The most one can accurately say is that Congress in 1980 "declined to require the registration of women." App. Br. at 6 (fn. omitted). Plainly stated, the Congress of 1980 left undisturbed what the Congress of 1948 had done. Such inaction is surely a far cry from an amendment which reenacts the old law based upon new and explicit reasons—despite Appellant's effort to blur the distinction. App. Br., at 28 n. 25.

In any event, it is settled that appropriations legislation does not amend, repeal or otherwise affect previously enacted substantive law, *TVA v. Hill,* 437 U. S. at 190, and that matters inserted into the Congressional history of funding legislation are irrelevant to the proper interpretation of prior substantive law. *Id.,* at 191-93.

In this case, reference to subsequent funding legislation is singularly inappropriate because H. R. J. Res. 521 was emergency legislation, as to which female registration was considered not on its merits, but as a threat to registration itself. 126 Cong. Rec., S 1242 (2/7/80) (Senator Heflin).[63]

"It is most significant that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights. U. S. Const., art. I, § 7." *Chada v. INS,* Slip Op., at 42 (No. 77-1702) (CA 9 12/22/80), "The Article I authorization to make law does not

61. (Cont'd.)

ments to the funding transfer were widely perceived as efforts to block registration altogether.

62. Motion to Affirm at 6-8.

63. In 1979 the committee reported a bill (S 109) mandating peacetime registration of males. President Carter, in his State of the Union Address in January 1980, recognized the need for registration to improve our defense posture. This issue of whether women should be registered became a dominant part of this discussion, confusing the real military issues. S. Rep. 96-826 at 157.

permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, . . . followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference." *Id.*, at 43.[64]

CONCLUSION

When it told women in 1948 that the Nation's defense was a mission for men only, Congress unthinkingly belittled half our people—and unfairly burdened the other half with the certainty of the regimentation and compulsion of registration, the appreciable likelihood of conscripted service, and a not insubstantial risk of coerced combat, to all of which only young men would be exposed. The line which Congress drew, reflexively and not for any considered reason, did not distinguish the combat-capable from those incapable of combat, the militarily useful from those unable to contribute to the defense effort, or otherwise separate the Nation's youth into two groups on some neutral basis arguably closely related to any important governmental purpose. Section 3 of the MSSA simply and starkly divided our daughters from our sons—and does so

64. In another context, Thomas Reed Powell wrote: "Now Congress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. . . . Of course when Congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that Congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking." *The Still Small Voice of the Commerce Clause*, Proceedings National Tax Association 337, 338-39 (1937), in 3 Selected Essays on Constitutional Law 931, 932 (1938). Even if judicial reliance upon Congress' silence in upholding certain exercises of state power under the Commerce Clause is entirely defensible, judicial reliance upon Congress' silence to support federal legislation otherwise violative of the Fifth Amendment is surely not.

to this day on a matter vital to both and on the basis of sex alone.

The District Court properly found Section 3 insubtantially linked to any legitimate objective and, indeed, found it to be altogether irrational and contrary to the very interests which it purports to further. Nothing about this case warrants a lower standard of review than that applicable to gender classifications generally; and the absolute and arbitrary use of gender to sort out fundamental civic obligations is insufficient not only under heightened scrutiny, but under the most minimal scrutiny as well.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 80-251

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ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANT

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1. Much ink has been spilled on the question what level of scrutiny should govern judicial consideration of this case. Lest our primary submission on this point be lost in the war of words, we restate it without embellishment: Because the challenged classification is based on national defense needs, the broad deference due Congress when it legislates in the military context demands the application of nothing stricter than the rational relationship test. See our opening brief at 15-20.[1]

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[1] Appellees would disregard the precedents requiring deferential review of military and defense-related actions on the ground (Br. 19), *inter alia*, that "[p]ersons called upon

2. As we discussed in our opening brief (at 21-23), application of the rational relationship test, rather than an intermediate level of scrutiny, is additionally warranted because, *inter alia*, the classification is based not on gender alone, but rather on the unchallenged ineligibility of women to be utilized in combat. Appellees respond both that the classification is not based on combat-eligibility and that, even if it were, an intermediate level of scrutiny nonetheless would be required. We address these contentions in turn.

a. First, as is apparent from the legislative history discussed in our opening brief (at 29-31), Congress' main reason for restricting draft registration to men was its belief that the primary demand on the induction system in a modern mobilization scenario would be for combat replacements, particularly

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to register are, by definition, civilians." This Court, however, has recognized the deference due Congress specifically in the context of civilians and the Selective Service System. *United States* v. *O'Brien*, 391 U.S. 367 (1968). Moreover, as we pointed out in our opening brief (at 3, 26) and as the district court recognized (J.S. App. 21a), the registration and conscription provisions of the Military Selective Service Act are interlocked; registration is, in effect, the first step of the induction process. In turn, the determination of who shall be inducted in the event of a mobilization necessarily implicates the question of "who shall serve [in the Armed Forces] and in what way" (*United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931)) and "complex, subtle, and professional decisions as to the composition * * * and control of a military force * * *" (*Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). In these circumstances, appellees' response is of a kind with the argument that voting discrimination presents only a "political question," and it merits the same short treatment as "little more than a play upon words." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

replacements in combat specialties that are closed to women under current law and policy. In other words, Congress' expressed intent was to classify on the basis of combat eligibility.

Second, as we also showed in our opening brief (at 21-23 & n.22), the *effect* of Congress' focus on combat-eligibility is similarly gender-neutral, in that men who are unfit for combat are weeded out at subsequent stages of the induction process. Appellees challenge this analysis by suggesting, on the basis of Army regulations that would allow for the relaxation of physical standards for induction during a mobilization, that men would be inducted in the event of a mobilization without regard to their combat eligibility (Br. 9-12). Appellees' understanding of the Army regulations is incorrect.

Under the Army's physical standards regulations, selective service registrants subject to induction are given physical examinations, and each of six designated body functions (abbreviated as PULHES)[2] is assigned a rating ranging from "1" (best condition) to "4" (worst condition) (AR 40-501, ¶ 9-3*c*). The series of ratings constitutes a physical "profile." All service members periodically are reexamined and their profiles updated. AR 40-501, ¶¶ 9-2, 9-3 and 9-5. Individuals with profiles including only "1's" and "2's" are considered "combat fit" and, at the least, are considered to have no significant assignment limitations. AR 40-501, ¶ 9-5 Chart. Generally, only individuals in this category are subject to induction. See AR 40-501, ¶¶ 9-3*c*, 9-5 Chart. Appellees, however, focus on the Chapter 6 (mobilization medical fitness)

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[2] P=physical capacity or stamina; U=upper extremities; L=lower extremities; H=hearing and ear; E=eyes; S=psychiatric. AR 40-501, ¶ 9-3*b*.

standards and on AR 40-501, ¶ 9-3*c*(3). That paragraph provides (emphasis added):

> A profile containing one or more numerical designations "3" signifies that the individual has medical condition(s) or physical defect(s) which require certain restrictions in assignment within which the individual is physically capable of performing full military duty. Such individuals are not acceptable under procurement (entry) standards in time of peace, but *may be acceptable in time of partial or total mobilization.* They meet the retention standards, while in service, but should receive assignments commensurate with their functional capability.

Appellees apparently assume both that whenever there is a mobilization Chapter 6 standards obtain and that men in the "profile 3" group—whom appellees perceive as unfit for combat assignment (but see page 7 & note 6, *infra*)—are automatically subject to induction.

But Chapter 6 standards do not apply automatically in the event of a partial or total mobilization. Rather, as AR 40-501, ¶ 6-2 explains, "[t]hese [mobilization medical fitness] standards will be implemented only upon specific instruction from the Service Secretaries, and will apply to personnel categories as directed." Similarly, ¶ 9-3*c*(3) does not provide that profile 3 registrants shall be, will be or "*are* inductible" in the event of a mobilization (Appellees' Br. 10; emphasis in original). Rather, it states only that "profile 3" registrants "may be acceptable" in such circumstances. Whether any profile 3 registrant would be inducted turns on AR 40-501, ¶ 6-2, quoted above. Thus, unless a special Chapter 6 directive is issued by the Service Secretaries, physical stand-

ards for induction are governed—during partial mobilization, wartime or otherwise—by Chapter 2 of AR 40-501 (appellees do not dispute that that chapter excludes individuals not physically qualified for combat training and deployment).[3]

Appellees suggest (Br. 10), however, that a relaxation to Chapter 6 standards during wartime is mandated by 50 U.S.C. App. 454(a), which provides that "the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted * * * in January 1945." But that statute requires no such relaxation, since the Chapter 2 standards more closely resemble the standards that were in effect in 1945 than do the less rigorous Chapter 6 standards. Compare AR 40-501, Chapter 2, with Standards of Physical Examination During Mobilization, 19 April 1944 (*reprinted in* Medical Department, United States Army, *Physical Standards in World War II*, Appendix B at 161-207 (1967)). AR 40-501, Chapter 6, thus embodies contingency standards, rather than the 1945 standards, as appellees apparently assume.

Thus, despite the fact that the Korean War and the Vietnam conflict were "partial mobilizations,"[4]

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[3] While the point barely merits a footnote, we note that, contrary to appellees' assertion (at 10 & n.26), under both the Chapter 2 and the Chapter 6 standards certain types of flatfootedness constitute grounds for rejection from service. The Chapter 6 standards, however, refer to the condition by its Latin name, *pes planus*. AR 40-501, ¶ 6-11*c*(2).

[4] *The Department of Defense Dictionary of Military and Associated Terms*, Joint Chiefs of Staff Publication No. 1, at 254 (1 June 1979), defines "partial mobilization" as an "[e]xpansion of the active Armed Forces (short of full mobiliza-

and therefore potentially subject to the application of Chapter 6 entry standards pursuant to ¶ 9-3*c* (3), those drafts were governed by Chapter 2 standards alone.[5] Nor is there reason to anticipate that there would be a relaxation of entry standards in the event of a conflict in the near future, particularly in view of the evidence before Congress that a modern mobilization would be a more selective mobilization (see our opening brief at 36), Congress' express judgment that a modern draft would serve primarily to supplement our standing volunteer army with combat and combat support personnel (*id.* at 29-30), and the fact that there is presently available a relatively large pool of militarily eligible men (see *America's Volunteers—A Report on the All-Volunteer Armed Forces* 190 (Dec. 31, 1978)).

Furthermore, even if the Chapter 6 standards were invoked, ¶ 6-2 limits induction thereunder "to personnel categories as directed." The Department of Defense advises us that that paragraph contemplates the induction of lower profile individuals only in the event of a need for selected skills that could be supplied by persons with physical impairments that would not preclude adequate performance of their duties.

Finally, appellees misconstrue the Army regulations as providing that profile 3 individuals are non-

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tion) resulting from action by Congress or the President to mobilize Reserve Component units and/or individual reservists * * *." Reservists were mobilized during both the Korean War and the Vietnam conflict.

[5] We are advised by the Department of Defense that no individuals with serial 3 ratings were conscripted during those conflicts.

combat assignable. There is no basis for that assumption. A review of the particular limitations that can attach to serial 3 registrants (AR 40-501, ¶ 9-5 Chart) reveals that while such registrants are unable to fill some combat or close combat support roles, they are available for others.[6] Thus, male registrants with even serial 3 profiles can be deployed to combat and combat support roles, and hence would be more readily transferable to a wider variety of assignments than higher profile women made ineligible for such positions by law or policy.

In sum, while there are provisions for exceptions—which might or might not be invoked—the rule generally obtains that the men who ultimately are inducted are those who are physically capable of performing a broad range of combat assignments, while those who are physically unsuited for such assignments are excluded through the classification process.[7]

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[6] For example, the only limitation on a profile "3," code "L" individual is that he not be assigned a position that requires daily exposure to extreme cold.

[7] Appellees also suggest (Br. 11 n.28) that the male-only draft registration does not reduce to a distinction between the combat-fit and the combat-unfit because close combat assignments, "such as infantryman," require scores of "1" on every PULHES factor in order to "meet Army qualification standards," citing AR 611-201, at 3-11-6. This argument is not persuasive. First, the standards contained in AR 611-201 are simply guidelines, which merely reflect that, given currently available personnel, the fittest are to be placed in the most demanding assignments. The regulations themselves "*emphasize*[] *that the physical profile serials associated with the various MOS* [*military occupational specialties*] *are*

An analogous general rule obtains with respect to women's ineligibility for combat assignments (see our opening brief at 21-22). As we noted in our opening brief (at 22 n.19), women presently are assigned to combat support and combat service support units in divisions, including maintenance battalions, signal battalions, brigade level headquarters and certain artillery units. It is not in those positions, however, but rather in the close combat positions from which women are, by statute and policy, "categorically excluded" that Congress expected the most critical shortages to occur in the event of mobilization. Accordingly, it is entirely accurate to describe the exclusion of women from registration as the exclusion of those who are ineligible to perform the combat duties for which an emergency draft is expected to be required.[8]

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guides. While less than ideal, personnel with lower physical profiles may be used." AR 611-201, ¶ 1-10*b* (emphasis in original). Furthermore, appellees' assertion is factually incorrect. The very infantryman standard upon which they rely has been relaxed to permit the inclusion of a serial "2" in the profile. AR 611-201, Change 15 at 3-11-6 (Feb. 15, 1981).

[8] Appellees also attempt to disprove the existence of a combat eligibility criterion by pointing out (Br. 9), as we noted in our opening brief (at 23 n.22), that the MSSA provides (50 U.S.C. App. 456(j)) for the actual induction of conscientious objectors who are not opposed to participation in noncombat service. Preliminarily, conscientious objectors who fail to qualify for induction under the physical standards discussed above are excluded from induction on that broader ground. More specifically, the obvious purpose behind inducting physically able conscientious objectors for noncombat service is to discourage registrants from fraudulently apply-

b. Appellees further contend (Br. 14-16) that even if the male-only draft is based on women's ineligibility for combat, rather than on gender alone, that fact should bear only on the question of whether the applicable constitutional standard has been met, and not on the question of what standard should be applied. But if the basis for the challenged classification is something other than gender, there is no occasion for a court to apply the intermediate level of scrutiny that has been developed for use in that context. Hence, contrary to appellees' prediction (Br. 16), application of the rational relation test in the present case would not mean that "[w]henever gender was argued to stand as a surrogate for any other trait, we would retreat to minimal scrutiny, overruling a decade of decisions in the process."

This is not a case in which gender merely is "argued to stand as a surrogate" for combat ineligibility. Rather, as we showed in our opening brief (at 29-37), in limiting registration to males Congress itself focused on the combat-eligibility criterion. Moreover, the present case bears no resemblance to those relied on by appellees at page 15 of their brief, in which the only factors offered in justification of the challenged classifications were themselves sexual stereotypes or generalizations. Here, rather, as a re-

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ing for conscientious objector status with the objective of avoiding military service altogether.

Finally, the "doctors draft" represented an exceptional response to unique military needs. In any event, as appellees note (Br. 9 n.20), authorization for the "doctors draft," along with the statutory power to induct, has expired, and there is no assurance that it would be revitalized in the event that the general statutory power to induct were re-enacted (no doctors (as such) would be drafted under the general provisions of the MSSA at issue in this case).

sult of unchallenged statutory and policy restrictions, women are ineligible for combat assignments. Male-only registration, when properly viewed together with the concomitant classification and induction processes, thus reduces, as a matter of fact, to a distinction between the combat-fit and the combat ineligible.[9] Accordingly, as is more fully discussed in our opening brief at pages 21-23, under this Court's decisions in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the male-only draft system is not a classification based only on gender, and hence does not warrant application of an intermediate level of scrutiny. Cf. *Schweiker* v. *Wilson*, No. 79-1380 (Mar. 4, 1981) slip op. 11-12.[10]

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[9] Amici Women's Equity Action League Educational and Legal Defense Fund, *et al.*, argue (at 21-26) that the male-only draft registration may not be upheld on the basis of the statutes and policies that exclude women from combat positions because, they assert, those provisions are facially discriminatory and, therefore, presumptively unconstitutional. Amici's argument, however, is wholly inconsistent with this Court's approach in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). In that case, the Court upheld a distinction between the mandatory discharge provisions for male and female naval officers on the basis of combat restrictions on navy women (10 U.S.C. 6015), which, the Court noted, had not been challenged. 419 U.S. at 508.

Furthermore, it would be unfair to the government to preclude it from relying on statutory and policy restrictions that, up to this point in the litigation, have not been challenged as a result of appellees' chosen litigation strategy—to prove that "male-only registration is unconstitutional even assuming limitations on women in combat" (Appellees' Br. 1-2 n.2).

[10] Appellees contend, however, that the Court has never applied this mode of analysis to a statute that classifies expressly on the basis of gender, as the MSSA does. We submit, as we did in our opening brief (at 21-23), that just

3. In point II of our opening brief, we showed how Congress' decision to limit the draft registration to men substantially furthers the important governmental interest in meeting effectively the Nation's emergency military needs (opening brief at 29-38). In response, appellees argue first that whether or not the military *needs* women is constitutionally irrelevant, and second that the inclusion of women in the draft registration scheme would enhance military flexibility. Neither argument is persuasive.

Appellees' characterization (Br. 20) of the military need question as "[w]hether or not an all-male (or all white or all black) pool of registrants or stream of inductees would be sufficient to meet military needs * * *" is inaccurate. Congress did not conclude that there was no military need to draft women simply because men were available in their stead, but rather because the anticipated military need was for persons eligible for combat assignments and because the evidence showed that there were sufficient numbers of volunteer women available to staff the positions for which they were eligible (opening brief at 29-33). Furthermore, Congress did not stop at its conclusion that there was no affirmative need to

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such an analysis played a part in this Court's decision in *Schlesinger* v. *Ballard, supra,* which involved an express distinction between male and female naval officers. Moreover, in the same way that an ostensibly neutral statute may be an obvious pretext for invidious discrimination (see, *e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)), so may a facially gender-based provision be based on a purely neutral criterion, when the legislative history shows that Congress' intent was gender-neutral and when the effect of the entire statutory scheme, of which the gender-based provision is a part, is similarly gender-neutral.

draft women, but went on to conclude that substituting women for men in a finite pool of inductees would detract from military flexibility and emergency preparedness (*id.* at 34-38).

Appellees respond to that further conclusion by selectively quoting from testimony and suggesting possible uses of female inductees that might have supported Congress' reaching a different decision.[11] The existence of conflicting evidence, however, does not negate the substantial body of evidence on which Congress chose to rely. Moreover, appellees focus largely on statements favoring the *registration* of women. But the same witnesses who testified in favor of *registering* women, uniformly opposed *drafting* them (opening brief at 31-32). And, as we showed in our opening brief (at 26-28 & n.24), Congress refused to separate the two issues. When registration is properly regarded as the first step in the conscription process, only the latter testimony is probative.

4. Unable to refute the evidentiary basis for Congress' recent refusal to expand the MSSA to include women or to approve funding for the registration of women, appellees and amici Kastenmeier, *et al.*,

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[11] For example, appellees suggest (Br. 21-22) that in the first days of an "all-out" war in Europe between the NATO nations and the Warsaw Pact nations, female draftees could "free up" individuals already in the military and stationed in the United States to be sent overseas without the requisite twelve weeks of training. We are advised by the Department of Defense, however, that in its judgment mobilization needs would best be served by delaying the accession of even volunteer women (except those with especially needed skills) until at least 60 days after mobilization, so that the examining stations would be available first for the examination of men, because of their eligibility for assignment to the crucial combat positions.

finally would have this Court ignore altogether the extensive legislative history underlying those decisions as mere "litigation-inspired afterthoughts" and "after-the-fact rationalizations" (Appellees' Br. 31-32).[12] Specifically, appellees and amici first would discard H.R.J. Res. 521, 96th Cong., 2d Sess. (1980), which authorized the transfer of funds to the Selective Service System for the registration of men, as merely a funding measure, and then would discount the Specific Findings adopted by both Houses of Congress in connection with their passage of the 1981 Defense Authorization Act as superfluous because H.R.J. Res. 521 already had authorized the necessary transfer of funds.[13] This attempt artificially to splinter and denigrate what was a substantive reconsideration and, in effect, a reenactment of the male-only draft registration mechanism based on present defense mobilization needs (see our opening brief at 28 n.25) cannot succeed.[14]

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[12] Even the district court recognized that the legislative history accompanying the renewal of registration and the rejection of proposals to register women should be taken into account (see J.S. App. 23a-28a), although, we submit, it failed to accord the proper weight to that history.

[13] Appellees and amici also seek to portray the Specific Findings as having been prepared in response to a government request suggesting that supporting legislative history would be necessary for the defense of this case (Br. 31-32; Amici Br. 20-21 & n.14, 24). It is a sufficient response to point out that the substance of the findings contained in S. Rep. No. 96-826, 96th Cong., 2d Sess. (1980), had been set forth in the 1979 report of the Senate Armed Services Committee, S. Rep. No. 96-226, 96th Cong., 1st Sess. 8-9 (1979), which was issued well before the testimony on which appellees and amici rely.

[14] Indeed, until Congress authorized the transfer of funds to the Selective Service System to begin registration, the MSSA was essentially dormant (see our opening brief at 3-4 n.1).

TVA v. *Hill*, 437 U.S. 153 (1978), on which appellees and amici Kastenmeier, *et al.*, rely, does not avail them. In that case, this Court merely held that appropriation measures for TVA's Tellico Dam Project could not be regarded as an implied repeal of the Endangered Species Act of 1973 as it applied to the dam because, *inter alia*, the legislative history of actions of the appropriations committee were not indicative of the meaning of the Endangered Species Act, which had been reported out of a different committee. In so holding, the Court pointed out (*id.* at 192) that there was "no indication that Congress as a whole was aware" of the implications of the appropriation measures for the Endangered Species Act.

Here, of course, no question of repeal by implication is involved. Rather, there was a revitalization and a refunding of an extant, but dormant, statute on the basis of newly developed and articulated military considerations.[16] Nor is the proposition urged on this Court by appellees (Br. 34)—that appropriations legislation "does not * * * affect previously enacted substantive law"—an absolute rule. Rather, each appropriations measure must be evaluated on its facts and with an eye to discerning actual congressional intent. See generally, *Greene* v. *McElroy*, 360 U.S.

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[16] Moreover, Congress knew exactly what it was doing when it refused to require the registration of women. Contrary to appellees' assertion (Br. 33; emphasis in original) that "[a]t no point * * * did Congress take a single step to *prevent* the expenditure of funds on the registration of women," as we noted in our opening brief (at 6-7 n.7), on a number of occasions in various congressional forums the substantive question of authorizing the registration of women was considered and rejected.

474, 504-505 & n.30 (1959); *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944).[16]

At all events, the most detailed legislative history, the Specific Findings contained in S. Rep. No. 96-826, 96th Cong., 2d Sess. (1980), did not attend a mere appropriations decision. To the contrary, those findings were generated by the Senate Committee with substantive jurisdiction over the Military Selective Service Act in connection with its consideration of whether to amend the Act to provide for the registration of women, and they were ultimately endorsed by both Houses of Congress in connection with the passage of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1077.[17]

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[16] Here, H.R.J. Res. 521 was inextricably bound to the substantive reconsideration of the MSSA described *infra*, as is illustrated by the Senate Appropriations Committee's explanation of why it transferred to the Selective Service System less than the total amount that the President had requested: "Of this total [requested by the President], $8,500,000 for the registration of women has been deferred by the administration pending the passage of legislation authorizing the registration of women." S. Rep. No. 96-789, 96th Cong., 2d Sess. 1 n.1 (1980). Moreover, as we noted in our opening brief (at 7 n.7), during floor consideration of H.R.J. Res. 521 in both the House and Senate proposals to require funding for the registration of women as well as men were raised and rejected. 126 Cong. Rec. H2728-H2729, H2747 (daily ed. Apr. 22, 1980); 126 Cong. Rec. S6527-S6549 (daily ed. June 10, 1980).

[17] As amici Kastenmeier, *et al.*, note (at 10 n.7), there is a distinct difference between authorizing legislation and appropriations measures. Authorizing legislation is generated by a committee with jurisdiction over a particular subject matter (*e.g.*, the Senate Armed Services Committee), and constitutes basic, substantive legislation approving the specific programs for which funding will be required. Appropriations measures, on the other hand, merely provide the funding for the pre-

As we noted in our opening brief (at 6 n.7), at approximately the same time that the appropriations committees of the House and Senate were considering H.R.J. Res. 521,[18] the Subcommittee on Military Personnel of the House Committee on Armed Services, the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, and the full Senate Armed Services Committee were considering proposals to amend the MSSA to provide for the registration of women.[19] On June 3, 1980, the Senate Armed Services Committee rejected a proposal (S. 2440, 96th Cong., 2d Sess. (1980)) that would have required the registration of women under the MSSA. The committee adopted Specific Findings explaining

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viously authorized programs. Hence, amici's reference to the 1981 Defense Authorization Act, Pub. L. No. 96-342, which arose out of the House and Senate Armed Services Committees, as "the current defense [appropriations] act" (Amici Br. 9; see also Appellees' Br. 32) is erroneous. Pub. L. No. 96-342 considered on their merits and authorized major weapon systems, defense-related research programs and civilian and military personnel levels, and set a ceiling on the funds that could be appropriated to support those programs and levels in fiscal year 1981. The actual appropriation of funds, however, was accomplished by an entirely separate act, Department of Defense Appropriation Act, 1981, Pub. L. No. 96-527, 94 Stat. 3068.

[18] The House passed H.R.J. Res. 521 on April 22, 1980 (126 Cong. Rec. H2752 (daily ed. Apr. 22, 1980)), and the Senate passed it on June 12, 1980 (126 Cong. Rec. S6773 (daily ed. June 12, 1980)).

[19] On March 6, 1980, the House Subcommittee tabled H.R. 6569, 96th Cong., 2d Sess. (1980), which would have amended the MSSA to permit the registration of women. Legislative Calendar, House Comm. on Armed Services, 96th Cong., 2d Sess. 53 (Sept. 30, 1980). The full House Committee never considered the measure.

the reasons for that decision in its report on the Fiscal Year 1981 Defense Authorization Bill, which the committee amended to include a provision authorizing the transfer of $13.3 million to the Selective Service System to begin the registration of men. Thereafter, the House-Senate conferees on the Authorization Bill specifically endorsed the Senate Armed Services Committee's Findings, S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980), and both Houses of Congress adopted the Specific Findings by passing the Conference Report. 126 Cong. Rec. H7800, S11646 (daily ed. Aug. 26, 1980).[20]

Finally, appellees and amici attempt to discredit the Specific Findings as the "Congressional equivalent of *obiter dictum*" (Appellees' Br. 33) on the ground that the Senate ultimately receded from its amendment authorizing the transfer of funds to the Selective Service System because that already had been accomplished by H.R.J. Res. 521. See S. Conf. Rep. No. 96-895, *supra*, at 100. It was in the *very next line* of the Conference Report, however, that the conferees expressly "endorse[d] the Specific Findings on registration of women contained in the Senate report" (*ibid.*). Thus, regardless of whether that statement be deemed "Congressional * * * *dictum*," it unequivocally expressed Congress' intent to retain the male-only draft registration because the present mobilization deficiencies are concentrated in the combat arms, and because women, by current law and policy, are not eligible to meet those needs. See S. Rep. No. 96-826, *supra*, at 160-161.

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[20] In view of the adoption of the Conference Report by both Houses of Congress as well as the other bicameral consideration of measures requiring the registration of women (see our opening brief at 6 n.7), there is no basis for appellees' reliance (Br. 34-35) on language disapproving the one-house veto in *Chadha* v. *INS*, 634 F.2d 408, 434-435 (9th Cir. 1980).

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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No. 80-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMICUS CURIAE BRIEF OF STACEY ACKER, CHRISTINA ANDRES, KATHRYN BARR, ALMEDA CANNON, ELIZABETH CREMERS, MONICA DEWIT, MARY DOLEHIDE, ESTHER GLUCKSMAN, ANNA HARRINGTON, LAURA HEADLEE, CORLISS JARRETT, KAREN JOHNSON, PAM PATRICK, FELICITY SMITH, KATHLEEN SULLIVAN and AGNES ZEPEDA

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Stacey Acker and fifteen other female citizens of the United States between the ages of 18 and 26, pursuant to Rule 36 of the Rules of this Court, present this brief on behalf of themselves and millions of other women who will be vitally affected by the disposition of this case. The Solicitor General and counsel for appellees have consented to the filing of this brief. *See* Exhibits A and B.

INTEREST OF THE AMICUS CURIAE

The direct interest of the *amici* in this litigation is plain. Each will be directly affected by the decision of this Court, and all represent the interests of millions of other similarly situated women who will also be directly affected by that decision. If the decision of the district court is affirmed, women will, for the first time in the history of the United States, become subject to registration and induction into the Armed Forces.[1] Despite the possibility of this unprecedented result, there is *no* party to this litigation who represents the interests of *any* woman, or who has made arguments reflective of the interests of women in the outcome of this case. Plaintiffs represent solely their own interests as males subject to registration and induction. That interest is directly contrary to the interests of the *amici* and all women in the continuation of women's historical exemption from registration and induction. The government represents its own interests, which it has framed solely in terms of military efficiency. In fact, the Executive Branch has put itself on record as favoring the registration and induction of women. Thus, the *amici* remain wholly unrepresented in this litigation.

Each of the *amici* believes, for varying reasons with broad societal significance, that Congress acted properly in continuing the historical exemption for women from draft registration and induction found in the Military Selective Service Act, 50 U.S.C. App. §§451 et seq. (herein-

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[1] In the event that the statute at issue, the Military Selective Service Act (MSSA), 50 U.S.C. App. §§451, *et. seq.*, is declared unconstitutional because it is not gender-neutral, Congress will have no choice but quickly to re-enact the MSSA to include women as registrants and possible inductees. The interest of the amici in this case is, therefore, direct and immediate.

after "MSSA").[2] They express concerns about the impact of registering and inducting women that represent the broad spectrum of public opinion recently presented

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[2] As described in our Motion to Intervene in this Court, these *amici* sought to intervene in *Barnett v. Rostker*, No. 80-1578 (D.D.C., complaint filed June 26, 1980), and alleged the following:

(1) Stacey Acker is a female resident of Alabama and a citizen of the United States. She was born on September 7, 1960. Miss Acker hopes to marry and have children. Registration and potential induction into military service would hinder and disrupt these plans. Miss Acker believes that Congress properly exempted women from registration and compulsory military service because women should not be conscripted during their best child-bearing years and because women who are mothers have a greater responsibility to care for their small children than to engage in military service.

(2) Christina Andres is a female resident of Florida and a citizen of the United States. She was born on November 28, 1960. Miss Andres does not want to serve in the Armed Forces because she is not prepared to be assigned to military combat. She believes that Congress properly exempted women from registration and compulsory military service because compulsory induction will necessarily lead to assignment to the battlefield, no matter what the job is labelled.

(3) Kathryn Barr is a female resident of Wisconsin and a citizen of the United States. She was born on May 9, 1960. Miss Barr has engaged in competitive sports and knows that she cannot compete successfully against males in any contest which requires upperbody strength. She believes that Congress properly exempted women from registration and compulsory military service because women are unable to match men in this important physical characteristic, which may be a matter of life or death in military combat.

(4) Almeda Cannon is a female resident of Tennessee and a citizen of the United States. She was born on January 27, 1962. Miss Cannon does not want to serve in the Armed Forces because she fears sexual abuse. She believes that Congress properly exempted women from registration and compulsory military service because of the great potential for sexual abuse if women were inducted, as described in Congressional hearings conducted last year.

(5) Elizabeth Cremers is a female resident of Illinois and a citizen of the United States. She was born on June 5, 1961. Miss Cremers does not want to serve in the Armed Forces

[footnote continued]

to Congress as part of its decision-making process on whether to remove the exemption for women presently

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because she does not want to be responsible for endangering men who serve with her, particularly in combat situations, who might instinctively protect her while jeopardizing their military missions. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that, as a result of instinct and training, many male members of the Armed Forces would not be able to treat women as equals in military situations.

(6) Monica Dewit is a female resident of New Jersey and a citizen of the United States. She was born on June 4, 1962. Miss Dewit does not want to serve in the Armed Forces because she fears that if she were ever captured by the enemy, she could not survive as a prisoner of war. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that if women were inducted into the military and were ever captured in actual conflict, they would be subject to much worse treatment than men.

(7) Mary Dolehide is a female resident of Illinois and a citizen of the United States. She was born on September 5, 1962. Miss Dolehide does not want to register and serve in the Armed Forces because she knows, from having heard the public testimony of Defense Department officials, that there are few practical restraints on the kinds of duties to which the Army may assign female inductees and because certain assignments, particulary those in combat zones, are tasks she cannot and will not perform. She believes that Congress properly exempted women from registration and compulsory military service because it knew that, if inducted, women might be deployed by the Army in combat zones.

(8) Esther Glucksman is a female resident of New York and a citizen of the United States. She was born on January 24, 1960. Miss Glucksman does not want to register and serve in the Armed Forces because she cannot participate in compulsory military service in any capacity, including alternative civilian service, without violating her religious principles, based on Orthodox Jewish law relating to modesty by women ("tznius"), as authoritatively prescribed by rabbinic decision. She believes that Congress properly exempted

[footnote continued]

found in the MSSA. Their interest in presenting these arguments to the Court is to ensure that this Court's

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women from registration and compulsory military service because it knew that many women in the United States have religious scruples against compulsory service relating particularly to their status as women.

(9) Anna Harrington is a female resident of Virginia and a citizen of the United States. She was born on June 12, 1962. Miss Harrington does not want to serve in the Armed Forces because she believes that combat and other tasks performed by those in military service are, by tradition and by actual performance, more capably done by men than by women. She knows that she cannot engage in actual combat with enemy male troops, and she believes that women in military service will endanger not only their own lives but those of other soldiers. Miss Harrington believes that Congress properly exempted women from registration and compulsory military service because it recognized that men can fight and do military jobs better than women.

(10) Laura Headlee is a female resident of Michigan and a citizen of the United States. She was born on March 13, 1961. Miss Headlee does not want to register and serve in the Armed Forces because doing so would conflict with her beliefs, based upon her upbringing and religious background, that men are responsible for protecting the country and women are responsible for maintaining the home and caring for the family. She believes that Congress properly exempted women from registration and compulsory military service because it knew that many women in the United States would find military service, in any capacity, to be an infringement upon their rights of conscience and free exercise of religion.

(11) Corliss Jarrett is a female resident of Tennessee and a citizen of the United States. She was born on February 11, 1962. Miss Jarrett is the mother of a baby, and she has no husband. She does not want to serve in the Armed Forces because she will not be able adequately to care for her child while she is in military service. Miss Jarrett believes that Congress properly exempted women from registration and compulsory military service because it recognized that single mothers of small children are more greatly needed to care for

[footnote continued]

focus is not solely on the impact that a gender-neutral draft law would have on military efficiency, but also on

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their children than are single fathers, and that even the uncertainty of possible induction would disrupt the upbringing of these children.

(12) Karen Johnson is a female resident of Tennessee and a citizen of the United States. She was born on October 21, 1960. Miss Johnson does not want to serve in the Armed Forces because her right of privacy would be violated in military life, which is governed by male culture, and which accepts body contact, foul language, and personally offensive remarks which she, as a lady, finds obnoxious. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that involuntary induction into the Armed Forces would subject many women in the United States to invasions of privacy and mental suffering relating directly to their identity and self-image as females.

(13) Pam Patrick is a female resident of North Carolina and a citizen of the United States. She was born on April 4, 1961. Miss Patrick does not want to serve in the Armed Forces because her upbringing as a Christian woman has taught her that women should produce life, not destroy it. She believes that she cannot be trained to kill, even if she were never actually assigned to combat duty. She also fears physical injury which might result from training or combat. Miss Patrick believes that Congress properly exempted women from registration and compulsory military service because it recognized that many women in the United States would be unable, by reason of their upbringing as women and their feminine self-image, to participate in any way in a governmental function dedicated to the destruction of human life, and that physical disfiguration would be much more devastating to women than to men.

(14) Felicity Smith is a female resident of Missouri and a citizen of the United States. She was born on January 30, 1960. Miss Smith does not want to serve in the Armed Forces because she would find intolerable the lack of privacy in daily military life, particularly the dressing, bathing, toilet and sleeping facilities. These aspects of military life are

[footnote continued]

the impact such a law would have on society. To date, because of the limited spectrum of parties in this litigation, the latter impact has been wholly ignored. But only with this dual focus by the Court, on both military efficiency and societal impact, can a fully informed decision be made.

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contrary to her nature as a woman and to the personal behavior and habits which are part of her feminine nature. She believes that Congress properly exempted women from registration and compulsory military service because it recognized that many women in the United States would be unable to accept the military's infringements on privacy which would conflict with values with which they were raised.

(15) Kathleen Sullivan is a female resident of Illinois and a citizen of the United States. She was born on May 8, 1958. Miss Sullivan is engaged to be married to a man who has completed his military service. Her prospective husband would, therefore, not be subject to induction. The possibility that Miss Sullivan would be subject to involuntary induction would have a drastic effect on the prospective family's plans to have children. Miss Sullivan believes that Congress properly exempted women from registration and compulsory military service because even the possibility of involuntary induction of women would seriously affect the personal family decisions of many married couples.

(16) Agnes Zepeda is a female resident of Washington and a citizen of the United States. She was born on October 5, 1959. She does not want to serve in the Armed Forces because she knows, from having grown up with brothers in the family, that she is unable to equal men in performing tasks which require physical strength and agility, and she does not want the national defense to depend on her ability to perform physically taxing jobs. She believes that Congress properly exempted women from registration and compulsory military service because Congress knows that most tasks to be performed by military service would be done better by men than by women.

SUMMARY OF ARGUMENT

Because the function of an *amicus curiae* is to provide additional relevant perspectives and arguments to the Court, our argument will focus on the substantive reasons, other than military efficiency, that provide ample constitutional support for the exemption of women from draft registration and induction. We also will not address the question of burden of proof, which is adequately treated by the parties, although we believe that the military context of the plaintiffs' challenge substantially increases the deference that the judiciary should exercise in reviewing this Congressional decision.

Substantively, Congress based its decision to continue the male-only draft on various concerns, including "important societal reasons" such as "unprecedented strains on family life." The impact on society of reversing the long-accepted decision that women should not be *obligated* to serve in the armed forces is directly related to this country's national resolve necessary to a successful defense posture. It is not only legitimate but compelling for Congress to be concerned that such resolve not be weakened by forcing the public to accept a draft registration and induction system that would be unpalatable to the citizenry. Testimony was provided to the Congress to justify such a conclusion, and Congress found, on the basis of this testimony and its own common-sense judgments, that discontinuing the exclusion of women from registration and induction might endanger the entire draft system.

Historically, Congress has made its decisions regarding who should serve in the armed forces by considering not only military concerns, but also the economic, social and psychological needs of the American public. Deferments for clergy, students, married persons, and others

traditionally have found their justification not in military necessity but in other societal needs and concerns. The traditional exemption of women is no different. It grows out of societal concerns about the family unit, the nature of war and its impact on women, and the adverse circumstances necessarily imposed on women in the armed forces. It is both legitimate and compelling for Congress to rely upon these concerns in determining that the country's selective service system should be all-male rather than gender-neutral.

Women's exemption from the MSSA does not perpetuate sexual stereotypes of inferiority, nor does it encourage unequal privileges because of supposedly unequal responsibility. The military laws of the United States give ample opportunity to women to volunteer for service in the armed forces. In fact, women have traditionally volunteered in numbers sufficient to fulfill the armed forces' utilization of service women. There is no challenge here to the armed forces' present limited use of women. Nor is there any claim that the armed forces need more women than have volunteered. Because women are currently fulfilling the needs of the armed forces, and in fact are being encouraged to do so by the government, the possibility of reinforcement of "unequal privileges for unequal responsibilities" is not realistic, nor is it sanctioned by law. Indeed, the Congressional attitude toward women in the military has been increasingly to *encourage* their voluntary participation in military service, thereby undercutting any continuation of outmoded stereotypical attitudes toward women.

The lower court erred in completely ignoring these bases for the Congressional decision to continue the historical exemption for women. It improperly analyzed the constitutionality of the all-male draft in isolation

from the social context in which any system of military conscription must take place. Such assessments of the broad social impact of a decision to draft women are within the unique province of Congress to make and are not for the courts to ignore, especially where, as here, questions of our national defense and Congress' power under Article I, §8 are concerned.

In light of Congress' concern about the broad societal impact of a decision to discontinue the exemption for women from the draft, and the compelling and legitimate nature of that concern, its continuation of a draft limited to males was totally justified under any appropriate constitutional standard.

ARGUMENT

CONGRESS WAS LEGITIMATELY AND APPROPRIATELY UNWILLING, FOR SOCIETAL REASONS, TO WITHDRAW THE HISTORICAL EXEMPTION OF WOMEN FROM THE MSSA

For the first time in the history of this country, and contrary to the decision of every court that has ever faced the question,[3] the district court in this case has determined that the country's male-only registration and induction system, designed "to raise and support Armies" and "to maintain and support a Navy," Art. I., §8, is

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[3] *See, United States v. Reiser*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976); *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975), *United States v. Camara*, 451 F.2d 1122 (1st Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *United States v. Fallon*, 407 F.2d 621 (7th Cir.), *cert. denied*, 395 U.S. 908 (1969); *Kovach v. Middendorf*, 424 F.Supp. 72 (D. Del. 1976); *United States v. Offord*, 373 F.Supp. 1117 (E.D. Wis. 1974); *United States v. Yingling*, 368 F.Supp. 379 (W.D. Pa. 1973); *United States v. Dorris*, 319 F.Supp. 1306 (W.D. Pa. 1970); *United States v. Cook*, 311 F.Supp. 618 (W.D. Pa. 1970); *United States v. Clinton*, 310 F.Supp. 333 (E.D. La. 1970); *Suskin v. Nixon*, 304 F.Supp. 71 (N.D. Ill. 1969).

unconstitutional because it is not gender-neutral. In doing so, the court made two fundamental errors which require reversal of the decision. *First,* and foremost, the court totally failed to consider the Congressional concern for the broad *societal* impact that removal of the exemption would have. It erroneously posed the determinative question as whether "there is a substantial relationship between the exclusion of women and the raising of effective armed forces" (Juris. St. App. 21a) thereby omitting consideration of any legislative policy concerns other than the "raising of effective armed forces." *Second,* it reached its holding in part by determining that the MSSA constitutes gender discrimination and is a "badge of inferiority" which in fact "relegate[s] women to an inferior status."[4] Juris. St. App. 15a. Both errors fatally infect the court's reasoning and holding.

A. Congress Traditionally Has Considered Societal Impact – Not Just Military Needs – In Determining Who Should Be Called Upon For Military Service

Before proceeding to Congress' recent consideration and rejection of a proposal for a gender-neutral MSSA, it is helpful to survey the recent history of the draft system and particularly those exemptions and deferments that have been granted by Congress. For the MSSA is not

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[4]This determination followed, in part, from the repeated mischaracterization of the effect of female draft exemption as the "exclusion" of women, occasionally without adding that women are being "excluded" from the *duty* of registration. *See, e.g.,* Juris. St. App. 2a, 20a, 21a, 24a. Compare Juris. St. App. 12a, 38a-39a, 43a. The effect of the law is not, of course, to "exclude" women from anything other than an obligation to register—a form of discrimination that is ordinarily described as an "exemption" rather than an "exclusion."

now, nor has it ever been, universal in its imposition of obligations on residents of the United States. The MSSA has always been, as its name implies, *selective;* contrary to the repeated assertions of the plaintiffs here, not *all* men are required to register and not *all* men are required to serve. Instead, Congress has considered the military needs of the country, balanced those along with the country's other economic and societal needs, added considerations of equity and fairness, and has arrived at periodic judgments as to who should be required to serve in the military, in what order and manner, and at what point in their lives.

The district court framed the question before it in the following terms (Juris. St. App. 21a):

> To summarize, we need only decide if there is a substantial relationship between the exclusion of women and the raising of effective armed forces.

If this were the real question, there would be little basis – substantial, rational or otherwise – for excluding *anyone* from registration and induction. But the modern MSSA, since its inception in 1948, has, with very minor variations, limited registration and possible induction to males between the ages of 18 and 26. Act of June 24, 1948, Pub. L. 759, 62 Stat. 604; Act of June 19, 1951, Pub. L. 51, 65 Stat. 75; Act of June 30, 1967, Pub. L. 90-40, 81 Stat. 100. What justification is there for a restriction of draft-eligible males to this category? The most obvious is that individuals in this age group can be removed, with least social disruption, from their civilian environments and compelled to perform national service. The fact that 18-to-26 year olds are likely to be in better physical condition than 27-to-35 year olds, or that they are likely to have more mature judgment than 14-to-17 year olds are not, by any means, the sole, or even

principal reasons why *all* individuals under 18 or over 26 are exempt. In setting the age limits, Congress considered that persons over the age of 26 are more likely to contribute to a productive national economy,[5] and that they ordinarily will have more dependents and have greater family responsibilities than those between the ages of 18 and 26. This basic societal decision controlled draft registration policy uninterruptedly since World War II, if not during the entire modern era.

Similarly, the MSSA since 1948, without amendment, has exempted from induction "regular or duly ordained ministers of religion, and students preparing for the ministry." *See* Act of June 24, 1948, Pub. L. 759, 62 Stat. 604, §6(g); 50 U.S.C. App. §456(g). Indeed, ministers of religion have been exempt from induction throughout the entire modern era. *See* S. Rep. No. 1268, 80th Cong. 2d Sess. 13 (May 12, 1948). And yet, there is no apparent *military* reason or basis for exempting ministers of religion from induction and service in the armed forces. This traditional deferment rests upon a societal judgment that such persons should not be legally obligated to serve in the armed forces. Ministry students and clergymen, as well as men over 26, have been permitted to volunteer for military service – just as women have throughout the modern era. But Congress has never deemed it appropriate to *require* service of ministers or those who are over-age, and the reasons go far beyond military necessity.

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[5] Senate Report No. 117 to the 1951 Universal Military Training and Service Act, 65 Stat. 75, explained that "the older the man, the more deeply his roots are sunk in community life, and the more likely his civilian activities would be of greater value than military service." S. Rep. No. 117, 82d Cong. 1st Sess. 8 (Feb. 21, 1951).

Deferments based upon other societal, as opposed to military, reasons have always been a part of our country's selective service system.[6] Thus in 1948 Congress recognized (S. Rep. No. 1268, *supra* at p. 5):

> the vital importance of maintaining our critical manpower resources to the fullest possible extent. Many groups – scientists, research workers, medical practitioners, engineers, industrial workers, to name but a few – make up the complex structure of our national life. All of these groups are important. The maintenance of a flow of persons into these groups is equally important.

Congress therefore created a "National Security Resources Board" to "determine what policies are necessary to best utilize our manpower resources, and prevent their wasteful depletion." *Ibid.* It authorized the President to defer from military service all individuals whose continued employment is "found to be necessary to the maintenance of the national health, safety and interest." 50 U.S.C. App. §456.

Perhaps the most controversial deferment has been for students engaged in higher education. Special treatment for students endured through two wars and approximately 25 years of the MSSA. The Senate Report on the 1948 Act, quoted earlier, recognized the counterbalancing need to maintain "a flow of persons" into

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[6] Conscientious objectors also receive deferments from active duty in the military. This reflects a societal judgment that sincere believers should not be required to do that which their consciences condemn. The critical question is not one of military efficiency, and the exemption of each conscientious objector increases the risk of induction of an otherwise eligible male. But because of a *societal* determination, that inequity has been implemented by Congress.

highly educated professions. That judgment, recognized in part in the Congressionally-sanctioned deferment of college and university students, was reaffirmed in 1951, and again after substantial debate in 1967. *See* Act of June 30, 1967, 81 Stat. 102, §6. Throughout this period, the focus of Congressional concern was the societal disruption that might result in the absence of such a deferment.[7]

Finally, and most directly relevant here, Congress consistently has considered the impact of the draft laws on the family unit. Thus, since 1948 the President has been authorized to defer from induction "any or all categories

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[7]In 1967, after being presented with a recommendation for the abolition of student deferments, the House Committee on Armed Services rejected the proposal, stating:

> Aside from these arguments raising questions of equity which, in the view of the overwhelming majority of the Committee on Armed Services, are without basis in fact, the committee believes that a continuation of college student deferments is clearly in the national interest. This view is well expressed in a statement received by the committee from the Executive Director of the Scientific Manpower Commission who, in testifying before the committee, said:
>
> > If we abolish student deferment, taking in by random selection at age 19 all those men who are needed, we would take about half the age group now deferred as students. This means that we would take about half of those who will ultimately become our doctors, our lawyers, our college professors, our research scientists, our graduate engineers, and other specialists. These men would have completed their military obligation before they attained their professional training. Where, then, would we get our service doctors, military lawyers, and the many other specialists whose work requires graduate training?

H.R. Rep. No. 267, 90th Cong. 1st Sess. 23-24 (May 18, 1967).

of persons in a status with respect to persons dependent upon them for support which renders their deferment advisable," and further, "to provide for the deferments . . . of any or all categories of persons who have wives or children, or wives and children, and with whom they maintain a bona fide family relationship in their homes." Act of June 24, 1948, 62 Stat. 612, §6(h). *See* 50 U.S.C. App. §456(h). This deferment authority has remained virtually unchallenged since the inception of the post-war MSSA. Yet the exemption of persons with families decreases the pool available for induction, thereby increasing the risk of induction to other eligible males. The reason for the deferment is societal, not military. It is based upon a judgment that the integrity of the family unit should be maintained to the extent possible, even in war time.[8]

Our purpose in discussing these various deferments and exemptions, and their rationale, is not to justify their existence, or to endorse the policies underlying all of them. They demonstrate, however, that the MSSA is a "selective" mechanism for determining who should be compelled to serve in the nation's armed forces, and that Congress' selectivity is frequently based on reasons having nothing to do with miliary efficiency or preparedness. Challenges to Congressional determinations in this area of the MSSA have been uniformly rejected. *See, e.g., United States v. Fallon,* 407 F.2d 621, 623 (7th Cir.),

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[8]In 1975, a new deferment was added for those persons who come from families which have had other family members captured or missing in action. 50 U.S.C. App. §456(o). This, too, is not a judgment based on military necessity. It is an equitable decision that a family which has suffered one loss should not be forced to risk a second.

cert. denied, 395 U.S. 908 (1969) ("Congress was entitled to consider factors which would . . . minimize the disruption of what were considered important civilian functions"); *Smith v. United States,* 424 F.2d 267 (9th Cir. 1970); *Liese v. Local Board 102,* 314 F.Supp. 521, 523 (E.D. Mo. 1970) (rejecting a challenge to the "sole surviving son" deferment), *aff'd on other grounds,* 440 F.2d 645 (8th Cir. 1971); *Talmanson v. United States,* 386 F.2d 811, 812 (1st Cir. 1967). The error of the district court here was its premise that Congress must relate its selection process to military needs only. This ignores the established and fundamental character of the MSSA and misapprehends its purpose. The true question in this case is, therefore, whether societal reasons justify, under the appropriate constitutional standard, Congress' conclusion that men should be subject to compulsory service, while women should serve in the armed forces only if they volunteer. We believe that the legislative record and common experience unequivocally support Congress' conclusion.

B. Congress Was Legitimately Concerned Over the Societal Impact of the Compulsory Induction of Women.

Congress explicitly noted that its recent rejection of the Executive Branch proposal to make the military draft gender-neutral was based not only upon its "assessment of the military needs of the nation," but also upon its assessment of "the societal impact of the registration and possible induction of women." S. Rep. No. 96-826, 96th Cong. 2d Sess. 157 (June 20, 1980). After assessing the military reasons for continuing the exemption, the Senate Committee on Armed Services then explained at length its concern over the societal impact of registering and inducting women:

> Finally, the Committee finds that there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be required to fight for the Nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the Committee finds compelling, witnesses representing a variety of groups testified before the subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result. A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The Committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.

Id. at 159.

Although the Committee spoke of various "societal reasons," it specified one primary concern—"the strains on family life that would result from the registration and possible induction of women." *Id.* at 161. This general conclusion was supported by the statement of the States Catholic Conference in testimony before the Senate Subcommittee on Manpower and Personnel that "the disruptive effects of [enacting a gender-neutral MSSA] on several dimensions of our social fabric outweigh the benefits which could be achieved by these measures," with particular reference to "the traditional concern of Catholic bishops and all Christian pastors . . . with

the welfare of the family." Hearings Before the Subcommittee on Manpower Personnel, Senate Committee on Armed Services on S.2294, 96th Cong. 2d Sess. 1706-1707. (R. 993-997). A similar position was taken by the Orthodox Jewish Coalition on Registration of Women for the Selective Service System:

> Furthermore, we believe that the inclusion of women in the Selective Service System would irreparably subvert the family unit in America, which is already battered and in grave danger. The American family, with the woman as its stabilizing element, would suffer a severe disruption. Registration of women would engender a rootlessness and a moral decimation in American society which can cause a more radical change than would an invading army.

Hearings Before the Subcommittee on Manpower Personnel, Senate Committee on Armed Services on S.2294, 96th Cong. 2d Sess. 1716 (R. 1016). Dr. Harold Voth of the Menninger Foundation, testifying before the House Subcommittee on Military Personnel in November 1979, expressed concern over the impact of increased use of women in the military, and particularly its adverse effect on the family. See also the remarks of Congresswoman Holt. Hearings before the Subcommittee on Military Personnel, House Armed Services Committee, 96th Cong. 1st Sess. 63-70 (unpublished).

The threat to "family life" which was feared by Congress and by the witnesses who testified against expanding the draft to include women is not a mere imprecise generalization. The legal obligation to register and be subject to induction produces uncertainty; the individual subject to the legal obligation and those dependent upon that individual cannot be sure that he or she

will continue in whatever voluntary civilian surrounding he or she chooses. This uncertainty – insofar as it affects the family – has a much more severe impact if women are subject to the legal obligation than if it is limited to men.

First, only women can become pregnant and bear children. Even slight uncertainty as to when and how she will be required to fulfill a draft obligation can seriously affect a woman's plans in this regard. A prospective father's absence from his home surroundings is acceptable, even if not desirable; a mother-to-be may not want to carry her pregnancy while in military service.

Second, the potential absence of a mother from a home is still more likely to be disruptive than the potential absence of a father. Family unity – or even family planning – will be much more adversely affected by the fear that a mother may be called away for national service than by an equivalent fear regarding a father. This difference was graphically demonstrated by Senator Nunn when, in the course of Congressional hearings, he was told that under the Executive Branch's proposal, mothers might be drafted, leaving fathers to care for the children and the home:

> You are going to be drafting women, not putting them in combat, but putting them in the military service and perhaps leaving their husbands at home to take care of the children. Anyone who thinks this society is prepared for that kind of shock is either operating in a different environment than I am or in a dream world.

Hearings Before the Subcommittee on Manpower Personnel, Senate Committee on Armed Services on S.2294, 96th Cong. 2d Sess. 1691 (R. 969).

Third, even where children are not a factor, the wife's actual or potential extended absence from the home is more likely, under contemporary norms, to impose an unacceptable strain on the family unit.

These concerns cannot readily be dismissed as the "outmoded baggage of sexual stereotypes." Few would question the value that the family unit provides to our national life, both in peacetime and in war. To dismiss Congressional attempts to ensure a continuation of the benefits of the family unit as "sexual stereotyping" misses the point, for it is vitally important to the national resolve to minimize strains on that unit. The historical exemption of women from the draft has ensured a certainty to the family unit that would not otherwise be there. Couples with children know, for example, that the mother can choose to remain with the children, no matter what the emergency. Subjecting women to the draft, however, would remove that confidence. *See* Testimony of Bernard Rostker, Hearings Before the Subcommittee on Manpower Personnel, Senate Committee on Armed Services on S.2294, 96th Cong. 2d Sess. 1691. (R. 968-969). The value of that certainty cannot be emphasized enough, and its continuation was a legitimate and compelling reason for Congress to exempt women from the obligations of the MSSA.

Legitimate gender-related concerns other than those centering on the family also justify limiting *involuntary* military service to men. The *amici* have expressed many of these concerns in their petition to intervene filed in *Barnett v. Rostker,* D.D.C. No. 80-1578, as specified in note 2, *supra.* We believe that large numbers of women in this country share those views, and they are known to the Congress. Specifically, it remains a fact that women are less accustomed to, and less willing to accept

the invasions of personal privacy which are a hallmark of military life than are men. As a result of religious training or family upbringing, many more women than men have ingrained feelings of modesty which are irreconcilable with military life. It is also a fact that in our contemporary society women have more reason to fear sexual abuse than do men, and the opportunities for such abuse are heightened when individuals are removed from ordinary civilian society and gathered onto military bases. Similarly undeniable is the fact that millions of women in this country – as well as millions of men – view military combat, and all the activities which support and surround military combat, as repugnant and inappropriate to the female gender.

Congress is not constitutionally obliged to disregard the overwhelming sentiment in the nation that a difference between the sexes is justified in the area of military service. Indeed, an accurate measure of public opinion on this sensitive subject is an important element in insuring that the system of military conscription is a workable one. For, as Senator Heflin noted, "the opposition to registering women is so widespread and pervasive that if young women were required to register, it might jeopardize the whole registration program." 126 *Cong. Rec.* S1242 (Feb. 7, 1980). Consequently, Congress expressed concern over "unpredictable reactions to the fact of female conscription,"[9] fearing that such reactions might weaken the national resolve.

Given these serious Congressional fears over the acceptability of a gender-neutral draft to the American public, the continuation of the exemption for women was eminently sound. Even granting that sexual roles in our

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[9] *See* p. 18, *supra.*

society are in a process of turmoil and change, Congress is not required to pioneer every social transition, particularly when the nation's military defense needs are at stake. To be sure, a Congressional decision which would affirmatively discriminate against a racial, ethnic or religious minority could not be sustained by this Court simply because it is supported by public opinion. But that is not this case. No disadvantaged group or historically isolated minority is being asked to sacrifice or shoulder an unequal burden. Even the district court here recognized that young males are *not* in need of special protection (Juris. St. App. 16a-17a), and it is that group, not a disadvantaged minority, which is called upon to serve.

National defense is among the highest of the country's priorities. It places a heavy burden upon the shoulders of our Executive and Congressional leaders. Congress has decided, in this instance and at this time in our nation's history, that the societal impact of reversing the centuries-old exemption for women from the draft would have unacceptable consequences for the nation and, consequently, for our military preparedness and national resolve. That judgment of Congress is entitled to great weight in the courts. *Schlesinger v. Ballard,* 419 U.S. 498, 510 (1975); *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

C. The Exemption of Women from Registration and Induction Is Consistent With Encouragement of Women Volunteers.

A fundamental error committed by the court below was its assumption that there is conflict between two totally consistent policies of present law with regard to women's service in the armed forces. The court called it "incongruous" that Congress is expanding the utilization of women in the military while it "endorses legislation

excluding women from the pool of registrants available for induction" (Juris. St. App. 38a-39a). If "military necessity" were, indeed, the sole relevant standard, there would be substantial incongruity in the simultaneous pursuit of these two policies. But Congress' legitimate consideration of other factors makes it eminently reasonable—indeed, compellingly reasonable—for Congress to encourage women *volunteers* while exempting women from compulsory conscription.

The MSSA, from its inception and through succeeding amendments, has required that only males register for possible induction into the armed forces. Although women have never been legally obligated to register and serve, Congress has long authorized and encouraged volunteer service by women in the military, extending even to the opening of the military service academies to women. *See, e.g.*, 14 U.S.C. §182(a) (1976).[10] Indeed, the district court relied heavily in its decision on evidence of the proficiency of women volunteers in the armed forces.

Encouragement of women volunteers does not mean, however, that all women should be subjected involuntarily to possible military service. For the reasons we have previously stated in this brief it is appropriate that women be given the option of serving or not serving the nation in a military capacity.

To give them that option, by means of the MSSA's exemption for women, plainly does not constitute "a badge of inferiority" that "stigmatizes women" (Juris. St. App. 15a). The district court, in characterizing the effect of the law in this way, relied upon recent cases

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[10]Judicial decisions have also expanded opportunities for women who volunteer for service. *E.g., Owens v. Brown*, 455 F.Supp. 291 (D.D.C. 1978).

decided by this Court striking down statutes that benefitted women at the expense of men. *See Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). But the statutes in none of the cited cases are similar to this statutory scheme, because the federal laws relating to military service encourage the *voluntary* participation of women in the armed forces.

The plaintiffs have filled the record with references to the present and expected increased role of women in the military and to their integration into the service from what had been a separate "women's force." The district court said that "the experience of women in the all volunteer army has been a success story" (Juris. St. App. 38a), and that the "extensive utilization of females in the military . . . will substantially increase" (Juris St. App. 41a). Women have not been "relegate[d] to an inferior status" by a "seemingly well-intended classification" (Juris St. App. 15a), but have been given ample opportunities while being liberated from unsound obligations which have no justification other than superficial even-handedness. There being no intentional or unintentional adverse effect on women because of their exemption from registration and induction, Congress' decision to continue that exemption, based upon the societal impact if it were terminated, is entirely legitimate and compelling.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions to enter judgment for the appellant.

Respectfully submitted,

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December 16, 1980

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Re: No. 80-251, Rostker v. Goldberg

Dear Mr. Rocap:

You have requested our consent to the filing of an amicus curiae brief in this case on behalf of Stacy Acker, et al. I am happy to consent to that filing.

Sincerely,

Wade H. McCree, Jr.
Solicitor General

cc:

Michael Rodak, Jr., Esqire
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January 6, 1981

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Re: Rostker v. Goldberg

Dear Mr. Rocap:

This is to inform you that appellees consent to the filing of an amicus brief on behalf of Stacey Acker, et al. The foregoing consent is not meant to, and shall not, constitute any concession on our part that the issues and interests raised in such brief are legitimate legal issues or are properly before the Court.

Very truly yours,

Donald L. Weinberg

DLW:mfp

No. 80-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,
Appellees.

On Appeal from the United States District Court For the Eastern District of Pennsylvania

BRIEF OF AMICI CURIAE, CONGRESSMAN ROBERT W. KASTENMEIER, CONGRESSMAN DON EDWARDS AND SENATOR CARL LEVIN

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BRIEF OF AMICI CURIAE, CONGRESSMAN ROBERT W. KASTENMEIER, CONGRESSMAN DON EDWARDS AND SENATOR CARL LEVIN

INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of the position of appellees, Robert L. Goldberg, *et al.* It is accompanied by written consent of appellant and appellees.

These *amici curiae* are members of the United States Congress. As legislators, they have an important interest in ensuring that the integrity of the legislative process is maintained and in having their legislative decisions accurately represented. Specifically, as participants in the Congressional debate over the resumption of all-male draft registration in 1980—a central issue in this case—these *amici* have an interest in ensuring that Congressional action in that regard is not misunderstood.

SUMMARY OF ARGUMENT

The three-judge district court correctly held that the male-only registration provisions of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*, invidiously discriminate between males and females in violation of the Due Process Clause of the Fifth Amendment, and are therefore void.

I.

Legislative classification schemes which differentiate on the basis of sex will be struck down under the Due Process Clause unless the classification scheme is shown to be substantially related to some important government objective. The 1948 male-only draft registration provisions of the Military Selective Service Act ("MSSA") involve such a sex-based classification and thus must meet this "intermediate" review test. However, as the Government admitted and the district court found, women were not excluded from the registration process in order to achieve any important government interest, but rather because of the widespread view shared by Congress regarding the "proper place" of women in society. As such, the all-male registration provisions of the 1948 Act are not substantially related to an important government objective and therefore violate the Due Process Clause.

II.

The Government cannot rely on the legislative history surrounding the appropriation of funds for resumption of the registration process in 1980 to find some legitimate government interest that might justify the exclusion of women from registration. To do so would run counter to the well-settled principle—recently upheld by this Court in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978)—that except in rare circumstances appropriations acts cannot repeal, amend or take the place of sub-

stantive legislation. This doctrine was designed to prevent modification or repeal of substantive or authorizing legislation in a way that Congress neither intended nor was aware of. The few cases in which courts have found repeal by implication have involved appropriations acts that affirmatively prohibited rather than permitted the spending of additional funds and were passed after extensive committee and floor debates in which the intent of Congress to repeal or amend the substantive statute was unambiguous.

The legislative history surrounding the appropriation of funds for resumption of draft registration in 1980 reveals that Congress did not intend at that time to repeal and reenact the MSSA for new and nondiscriminatory reasons. Rather, Congress simply appropriated funds for resumption of all-male draft registration, already authorized by the 1948 MSSA, and in the process provided some post-hoc legislative history to justify the admittedly discriminatory provisions of the MSSA. This Court should give no weight to such post-hoc rationalizations.

ARGUMENT

I. THE ALL-MALE REGISTRATION PROVISIONS OF THE MILITARY SELECTIVE SERVICE ACT OF 1948 ADMITTEDLY ARE NOT SUBSTANTIALLY RELATED TO ANY IMPORTANT GOVERNMENT INTEREST AND ARE THUS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

The Due Process Clause of the Fifth Amendment, like the Equal Protection Clause of the Fourteenth Amendment, prohibits legislative classification schemes that invidiously discriminate between similarly situated groups. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In 1976, this Court

held in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), that gender-based legislation must be reviewed carefully—*i.e.*, on the basis of "intermediate" or "middle-level" review—and would be upheld only if the classification scheme were demonstrated to be substantially related to some important government objective. *Id.* at 197. *See Wengler* v. *Druggists Mut. Ins. Co.*, 100 S. Ct. 1540, 1546 (1980); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979). Moreover, the party defending the classification scheme bears the burden of establishing the important government interests to be served by it, and the degree to which the "sex-centered generalization actually comport[s] with fact" must be substantial. *Craig* v. *Boren*, 429 U.S. at 199.

The all-male registration provisions of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.* (1976),[1] involve a sex-based classification and thus are subject to an intermediate or middle-level review by this

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[1] Section 3, 50 U.S.C. App. § 453, provides in part:

> "Except as otherwise provided in this title . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

Section 4(a), 50 U.S.C. App. § 454(a), provides in part:

> "Except as otherwise provided in this title . . . every person required to register pursuant to section 3 of this title . . . who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register . . . shall be liable for training and service in the Armed Forces of the United States . . . ."

Court.[2] Accordingly, the Government must establish that the all-male registration process promotes some important government objective and that the exclusion of women is substantially related to achievement of that objective. However, as the Government admitted in the district court in this case,[3] the legislative history of the MSSA, enacted in 1948, reveals that no consideration was given to whether male-only registration for conscription was necessary to achieve any important interest, or was even sound:

> "[T]he question of inclusion or exclusion of females in or from registration or conscription is not explicitly considered in any way in any of the statutory history of the Military Selective Service Act, as amended, or of any predecessor conscription statute in the United States." Appellees' Motion to Affirm at 4-5, quoting from Plaintiffs' Requests For Admissions (Set No. 2).

Moreover, the district court reviewed other legislation related to military service and also enacted in 1948 to determine the state of mind of Congress toward women and concluded that "[w]hen the MSSA was adopted in 1948 an aura of male chauvinism permeated Congressional attitudes toward women in the military."[4] It was

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[2] The argument establishing that an intermediate level of review is appropriate in assessing the constitutionality of the all-male registration provisions of the MSSA is persuasively made in Appellees' Motion to Affirm at 23-36, and will not be repeated here.

[3] *Goldberg* v. *Rostker*, Civil Action No. 71-1480 (E.D. Pa., July 18, 1980) (A copy of this decision is reproduced in Appendix A of Appellant's Jurisdictional Statement; all page citations to the decision are to that Appendix.)

[4] Appellant's Jurisdictional Statement at 23a n.15. The court pointed out:

> "During the same year Congress adopted a statute known as the Womens Armed Services Integration Act, 5 U.S.C. § 627.

[Footnote continued on page 6]

this widespread view of the "proper place" of women—rather than any important government interest—which provided the basis for the all-male registration provisions in the MSSA. *Id.*

In hearings before the House Subcommittee on Military Personnel of the Committee on Armed Services on March 5, 1980, Deputy Assistant Attorney General Larry L. Simms confirmed that in enacting the all-male registration provisions of the MSSA Congress was motivated purely by impermissible discriminatory purposes:

> "The reason for [not relying upon the legislative history or the reasoning of Congress to defend the all-male registration provisions of the MSSA] is, to summarize *that legislative history, it is replete with —and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature.*" Joint Appendix at 220, quoting from the Hearings on National Service Legislation, Subcomm. on Military Personnel of the House Armed Services Comm., March 5, 1980 (emphasis added).

Moreover, the legislative history of the enacted revisions and amendments to the MSSA reveal a similar absence

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[4] [Continued]

An example from the Congressional Record-House, June 2, 1948, page 6970 is illustrative:

> 'MR. VANZANDT: That is correct. We have a similar nurses organization for the Navy.
>
> Let me point out the position of the enlisted man. There is not a member of the House Committee on Armed Services who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a WAVE officer. Put yourself in the position of an enlisted man and I am sure you will agree with them.'" *Id.*

of Congressional findings justifying the exclusion of women from the registration process.[5]

Since the Government admittedly is unable to meet its burden of establishing that the exclusion of women from the registration process is substantially related to some important government interest, the all-male registration provisions of the MSSA, as enacted in 1948 and as amended, clearly invidiously discriminate between males and females in violation of the Due Process Clause.

II. CONGRESS DID NOT, BY APPROPRIATING FUNDS FOR RESUMPTION OF THE ALL-MALE REGISTRATION PROCESS IN 1980, REPEAL AND REENACT THE REGISTRATION PROVISIONS OF THE 1948 MILITARY SELECTIVE SERVICE ACT TO ACHIEVE SOME CONSTITUTIONALLY PERMISSIBLE PURPOSE.

In view of the admittedly discriminatory purposes underlying the all-male registration provisions in the MSSA, the government now seeks to rely exclusively on the legislative history surrounding resumption of the registration process in 1980 to find some legitimate government interest that might justify the exclusion of women from registration.[6] In essence, the Government's argument is

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[5] *See* Appellees' Motion to Affirm at 6, referring to the Record at 1713-14, ¶¶ 2, 4, 6.

[6] On February 12, 1980, President Carter recommended that Congress appropriate funds for a peacetime draft registration program and amend the MSSA to permit the inclusion of women in the proposed registration system, Presidential Recommendations for Selective Service Reform, H.R. Doc. No. 265, 96th Cong., 2d Sess. (1980). The House, on April 22, 1980, and the Senate on June 2, 1980, passed H.R.J. Res. 521, Pub. L. No. 96-282, 94 Stat. 552 (June 27, 1980), which provided for the transfer of $13.285 million from unobligated Air Force funds to the Selective Service System to permit resumption of the registration process under the 1948 MSSA provisions.

In addition, on March 5 and 19, 1980, hearings on the proposal to amend the MSSA were held before the Subcommittee on Military

that Congress, in the course of appropriating funds for registration of men in 1980, implicitly reconsidered and repealed the discriminatory registration provisions of the MSSA only to immediately reenact them in their same form but supported by new and allegedly nondiscriminatory purposes. Therefore, the Government contends, this Court should look to passage of H.R.J. Res. 521 and the defense appropriations act in 1980 and to their legislative history in order to determine that the MSSA's all-male registration provisions are substantially related to important government objectives and thus constitutional:

Personnel of the House Committee on Armed Services and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. By a vote of eight to one, the House Subcommittee on Military Personnel tabled the proposed amendment (H.6569) on March 6, 1980. The Senate Subcommittee then rejected the amendment (S.2440) by a vote of five to one, and issued a Report on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, Cong. Rec. S6531 (daily ed. June 10, 1980).

Subsequently, the Senate Armed Services Committee rejected the pending proposal to amend the MSSA to include women by a vote of twelve to five, and adopted the Specific Findings of the Subcommittee on Manpower and Personnel in its report on the pending Department of Defense appropriations bill for FY 1981, S. Rep. No. 826, 96th Cong., 2d Sess. 156-61 (1980). The defense appropriations act contained its own Selective Service funding transfer provision to permit reinstitution of draft registration, even though it was unnecessary since the Senate had already passed H.R.J. Res. 521.

On August 13, 1980, after the district court in this case had invalidated the male-only draft registration provisions of the MSSA, the House and Senate Conference Committee reported out the defense appropriations act and adopted the Findings of the Senate Subcommittee in its own report, H. Conf. Rep. No. 1222, 96th Cong., 2d Sess. 104 (1980). Significantly, the Conference Committee reported that the Senate had receded from its registration funding transfer provision since the transfer had already been "enacted in another . . . law." The reference, of course, was to H.R.J. Res. 521.

> "In evaluating the basis for drafting only men, the district court correctly considered the extensive legislative history underlying Congress' recent decision against amending the draft provisions of the MSSA to include women. . . . [T]he findings and conclusions articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were part of a comprehensive reexamination of the registration and draft issues in view of current military needs, and following lengthy hearings on the President's proposal to amend the Act and expand draft registration to include women. These findings culminated in the current defense [appropriations] act, Pub. L. No. 96-342, 94 Stat. 1077, which, in conjunction with H.R.J. Res. 521 (limiting the transfer of funds for registration to the amount necessary to register males), rejected the President's proposal to register women. See S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980). *This legislation thus essentially constitutes a reconsideration and reenactment of the gender-restricted draft registration, and it is therefore appropriate—indeed necessary—that its history be taken into account in evaluating the basis for that restriction.*" App. Br. at 28 n.25 (emphasis added).

The Government's argument is plainly wrong: As we show in section II.A. below, it runs counter to the well settled principle that except in rare circumstances appropriations acts cannot repeal, amend or take the place of substantive legislation. Moreover, as we show in section II.B., those rare circumstances are not present here. There is therefore no basis for concluding that Congress intended such a repeal and reenactment.

A. Appropriations Acts Will Not, Absent Unusual Circumstances, Be Held To Have Repealed, Amended or Replaced Authorizing Legislation.

As this Court recently pointed out in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), repeals by implications are disfavored; and therefore, repeal or modification of a substantive statute will be held to have occurred only when the new statute and legislative history together manifest a clear intention on the part of Congress to do so. Moreover, "[t]he doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriation Act." *Id.* at 190 (emphasis in original).

The doctrine against repeal by implication—especially by implication from appropriations acts—was designed to prevent the modification or repeal of a substantive or authorizing statute in a way that Congress neither intended nor was even aware of. It is premised on the assumption that authorizing legislation and appropriations acts are fundamentally different,[7] and that legislators, concerned primarily with the costs of various items in an appropriations act, should not also be required and will not be presumed to have examined in detail all of the possible impacts of the numerous provisions in any appropriations act on related substantive legislation.[8] As this Court explained in *TVA* v. *Hill*:

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[7] Authorizing legislation is basic substantive legislation which provides authority to do some function or activity; an appropriation, on the other hand, merely permits the previously authorized function or activity to incur obligations up to the specified amount in the appropriations act. *Andrus* v. *Sierra Club*, 442 U.S. 347, 360-61 (1979).

[8] This Court noted in *Andrus* v. *Sierra Club*, 442 U.S. 347 (1979), that Congress has traditionally distinguished between legislation and appropriations in order " 'to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation' . . . ." *Id.* at 361.

> "We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. . . . [T]his [would] lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation . . . ." 437 U.S. at 190.

A different rule would also flout the House and Senate rules which proscribe the amending of existing laws through appropriations acts.[9]

In *TVA* v. *Hill*, appellants argued that Congress, by continuing to appropriate funds for completion of the Tellico Dam after discovery of the snail darter, an endangered species, intended to and did repeal the Endangered Species Act—at least as to projects like the Tellico Dam. Otherwise, operation of the dam would have threatened the existence of the snail darter in violation of the Act. 437 U.S. at 189. In support of their argument,

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[9] 437 U.S. at 190. "House Rule XXI(2), for instance, specifically provides:

> 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.*'

See also Standing Rules of the Senate, Rule 16.4." *Id.* at 191 (emphasis added).

appellants noted that in appropriations committee hearings in 1975, 1976 and 1977, TVA discussed discovery of the snail darter and the relevance of the Endangered Species Act to the project, and asserted that "the Act did not prohibit the completion of a project authorized, funded, and substantially constructed before the Act was passed." *Id.* at 163. Moreover, the appropriations committees in the House and Senate adopted this view and explicitly stated their intention to repeal or amend the Endangered Species Act if necessary so that at least the Tellico Project could be completed. *Id.* at 165, 167, 170-171. Indeed, the Senate Appropriations Committee in 1977—after the Sixth Circuit had enjoined further construction of the Tellico Dam because it violated the Act—explicitly recommended the appropriation of funds and, if necessary, repeal of the Endangered Species Act to allow for completion of the dam:

> " 'This committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. *If the act has such an effect*, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, *funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.*' S. Rep. No. 95-301, p. 99 (1977)." *Id* at 171 (emphasis added).[10]

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[10] The House Appropriations Committee in 1977 also recommended repeal of the Act if necessary:

> " 'It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.' Report of the House Comm. on Appropriations, H.R. Rep. No. 379, 95th Cong., 1st Sess. 104 (1977)." *Id.* at 170.

Finally, appellants urged, the fact that TVA's budget—including funds for Tellico Dam—was passed by Congress on the recommendation of the House and Senate Appropriations Committees constituted further evidence that Congress had clearly intended to repeal the Endangered Species Act, at least insofar as it prevented completion of projects such as the Tellico Dam.

Despite such evidence, this Court was not persuaded that Congress as a whole was aware of the impact of this one provision of the complex appropriations act on the Endangered Species Act, or intended by appropriating funds for continuation of Tellico Dam to repeal portions of that Act. Although the Court recognized that "Appropriations Committees [had] expressly stated their 'understanding' that the earlier legislation would not prohibit [completion of the dam]," it pointed out that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . . ." *Id.* at 191. The committee reports were contradicted by the fact that "[t]here is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." *Id.* at 189. Moreover, "there is no indication that Congress as a whole was aware" of the appropriations committees' position. *Id.* at 192. Thus, the Court concluded, the statements in the committee reports " 'represent only the personal views of these legislators,' and 'however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage.' " *Id.* at 193.

Lower federal courts similarly enforce the doctrine against repeal by implication and hold that except in rare circumstances appropriations acts will not be assumed to amend, repeal or take the place of substantive legislation. Thus, in *Environmental Defense Fund, Inc.*

v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972), appellees claimed, *inter alia*, that while courts generally can review substantive agency decisions on the merits to determine whether they comply with the National Environmental Policy Act of 1969 ("NEPA"), such review was not proper where Congress appropriated funds for the project after an environmental impact statement had been filed, since notwithstanding the NEPA provisions, "the decision of Congress to fund the project . . . makes the decision to complete [it] a Congressional one not subject to review by the courts." *Id.* at 353.

The Eighth Circuit disagreed, concluding that NEPA required construction projects be completed in accordance with its substantive provisions and "[a]n appropriation act cannot serve as a vehicle to change that requirement." *Id.* at 353-54. Under both the House rules and the doctrine against repeal by implication, "legislators voting for bills appropriating funds for this project had the right to assume that the project would be carried out in accordance with the substantive provisions of NEPA." *Id.* at 355. The court concluded:

> "We simply hold that an appropriation act cannot change the requirements of NEPA. We recognize that Congress has the right to *authorize* projects and to exempt them from the provisions of NEPA, but Congress did not take such action here. No new authorization bill was passed after NEPA was enacted. The only authorization for the project was voted years before NEPA was passed." *Id.* (emphasis in original).[11]

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[11] *Accord, Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783 (1971) (passage by Congress of appropriations bills for test of nuclear warhead did not effectively repeal NEPA by conclusively determining the sufficiency of the environmental impact statement which the Commission was required by NEPA to issue).

Again, in *Libby Rod & Gun Club* v. *Poteat*, 457 F. Supp. 1177 (D. Mont. 1978), the defendants claimed that construction of a dam on the Kootenai River in Montana by the Corps of Engineers had been authorized by general provisions in several substantive statutes and, if not, then by successive appropriations acts which provided funds for the water development projects along the river. The court, quoting *Hill*, rejected the authorization-by-appropriations argument and concluded that "precedent clearly determines that appropriation cannot be equated with authorization." *Id.* at 1184.

The few cases in which an appropriations act has been held to impliedly repeal or amend substantive or authorizing legislation are clearly distinguishable. First, they involved appropriations acts which prohibited—rather than provided for—the spending of additional funds for some previously authorized activity or function. Second, since the prohibition of an activity generally involves a substantial affirmative act, such appropriations acts were also accompanied by considerable committee and floor debate in which the intent of Congress to repeal or modify a substantive statute was unmistakable.

Such was the case in *United States* v. *Dickerson*, 310 U.S. 554 (1940), which involved a 1922 statute authorizing the payment of bonuses to servicemen who re-enlisted. In 1938, Congress passed a rider to the appropriations bill for the Rural Electrification Administration providing:

> "'[N]o part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment' of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1938, notwithstanding the applicable portions of' [the 1922 Act]." *Id.* at 555.

The War Department's denial of re-enlistment bonuses to soldiers who claimed under the 1922 statute was sustained because the clear language of the 1938 appropriations act itself and the legislative history revealed a full and specific discussion of the appropriations act's repealing effect on the 1922 act. Moreover, the fact that the same provision was inserted in various appropriations acts for eight successive years was further evidence that Congress was aware of and intended the prohibition provision in the appropriations act to repeal the 1922 statute.

Similarly, in *Friends of the Earth* v. *Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), the Tenth Circuit concluded that a 1962 appropriations act, which prohibited the use of any of the funds appropriated "'for construction or operation of facilities to prevent waters of Lake Powell [a reservoir created by the Glen Canyon Dam] from entering any National Monument,'" *id.* at 7, implicitly repealed a 1956 statutory provision expressly prohibiting waters of the reservoir from entering any national park or monument. In reaching its decision, the court relied on the "extensive and unambiguous legislative history of the 1962 appropriations act," contained in hearings and floor debates, and on the fact that twelve successive appropriations acts contained provisions similarly expressly prohibiting the use of any funds for construction of any protective works for the National Monument involved. *Id.* at 9.[12] While the court acknowledged the strong presumption against repeal by implication, it concluded:

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[12] In *Sierra Club* v. *Morton*, 400 F. Supp. 610, 638 n.42 (N.D. Calif. 1975), the court emphasized that in *Friends of the Earth* v. *Armstrong*, the intent of Congress to amend the substantive law was manifestly clear from both the language of the Act which expressly prohibited certain action required by an existing statute, and the legislative history. In such a case, courts will give effect to the intent of Congress, even if it is expressed in an appropriations act.

"[On the basis of the appropriations act and the legislative history,] [t]his is thus not really a situation of repeal by implication . . . but more a reversal of a previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument. . . . This 'repeal,' if it should be called that, thus was straightforward, direct, and after hearings on the subject." *Id.* at 9.[13]

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[13] *Accord, City of Los Angeles* v. *Adams*, 181 U.S. App. D.C. 163, 556 F.2d 40 (1977). That case involved a 1970 statute that established an airport development program and authorized the Secretary of Transportation to make grants of "not less than" $250 million in each of the next five years. However, in FAA appropriations acts for those years, Congress appropriated amounts substantially less than that required under the act. Because the legislative history of the appropriations acts in each year clearly indicated that Congress was aware of and intended to appropriate less than the amount specified in the 1970 Act, the D.C. Circuit held that the appropriations acts had amended the expenditure authorization provision in the 1970 Act.

The Hyde Amendment cases present a clearly different issue, as this Court made clear last term in *Harris* v. *McRae*, 100 S. Ct. 2671 (1980). Beginning in 1976, Congress passed variations of the Hyde Amendment—prohibiting the use of appropriated federal funds for Medicaid abortions except in specified situations—as riders to the Health, Education and Welfare appropriations acts. But this Congressional action did not constitute an implied amendment of the underlying Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (1976). That statute is designed as a program of shared federal-state financial obligations, not of the federal government imposing financial burdens on the states. Therefore, when Congress made changes in the federal funding available for particular services under the Act, it automatically amended the Act and thus the state's obligation under it. Had Congress intended, by enacting the Hyde Amendments, to shift to the states the substantial burden of providing for the abortions required under the Act but for which federal funding had been withdrawn by the Hyde Amendments, it would have expressed its

B. The Language of the Appropriations Act and the Legislative History Reveal No Unambiguous Intent by Congress To Affect in Any Way the 1948 Military Selective Service Act.

Absent language in the appropriations act itself or clear evidence in the legislative history to overcome the presumption against implicit repeal of substantive statutes by appropriations acts, the Government's defense of the constitutionality of the all-male registration provisions of the MSSA collapses. As we show below, no such evidence that Congress in 1980 considered, much less intended to repeal and reenact the 1948 MSSA exists.

As in *TVA* v. *Hill*, the Government's argument here requires this Court to find that by passing an appropriations act Congress intended to substantially alter a substantive statute. In *Hill*, the alteration allegedly intended by Congress affected the scope of the Act's protection to endangered species; in this case the supposedly intended alteration goes to the purposes for which the all-male registration provisions of the MSSA were designed and thus affects their constitutionality under the Due Process Clause.

The policy reasons underlying the doctrine against repeal by implication, enumerated by this Court in *TVA*

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intention to do so in unambiguous terms. It did not. As this Court concluded,

> "Since Title XIX itself provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need not inquire, as the District Court did, whether the Hyde Amendment is a substantive amendment to Title XIX. The present case is thus different from *TVA* v. *Hill*, 437 U.S. 153, 189-93 . . . , where the issue was whether continued appropriations for the Tellico Dam impliedly repealed the substantive requirements of the Endangered Species Act prohibiting the continued construction of the Dam because it threatened the natural habitat of an endangered species." *Id.* at 2684 n.14.

v. *Hill*, apply with equal vigor here. When Congress considers a proposal for a substantive statute, such as the Endangered Species Act or the Military Selective Service Act, the focus of the hearings and debates presumably is on such issues as whether and why the act is necessary; what objectives it will achieve; what its coverage ought to be; what exceptions will be allowed; and what if any impact it will have on other statutes. Thus, Congress is presumed in enacting authorization legislation to have fully considered the issues and to have intended to do what the statute purports to do. In passing appropriations acts, on the other hand, Congress is not required by its own rules nor could it consider all of the possible effects on substantive statutes of the numerous provisions in even a single appropriations act. Therefore, to avoid holding that a substantive statute has been modified or repealed in a way that Congress was neither aware of nor intended, courts will not find that a repeal or modification by an appropriations act has occurred absent a clear showing that Congress as a whole intended it.

An examination of the legislative history reveals that Congress did not intend by appropriating funds for resumption of the registration process in 1980, to repeal and reenact the MSSA for new and allegedly nondiscriminatory reasons. The smattering of statements hidden in the legislative history and cited by the Government are clearly inadequate to support a contrary conclusion.

On March 5 and 19, 1980, hearings on the President's proposal to amend the MSSA to permit inclusion of women in the draft registration system were held before the Subcommittee on Military Personnel of the House Committee on Armed Services and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. By a vote of eight to one, the Military Personnel Subcommittee tabled the proposed amendment

(H.6569) on March 6, 1980. The Senate Subcommittee on Manpower and Personnel then rejected the amendment (S.2440) by a vote of five to one, and issued a Report on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, Cong. Rec. S6531 (daily ed. June 10, 1980). In spite of the fact that the Department of Justice, in testimony before the Senate Subcommittee, referred to this case—then before the district court—and implored the committee to provide a record that would justify the all-male registration provisions in the MSSA,[14]

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[14] Larry L. Simms, Deputy Assistant Attorney General, testified:

"Before doing so, I would like to note that that is a matter that is currently in litigation before a three judge Federal Court in Philadelphia, the specific issue of the constitutionality of an all male draft.

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"In our analysis you will note that in support of the constitutionality of the all male draft we do not call on in any way the legislative history or reasoning of the Congress which in 1949 adopted the law which the Administration is presently urging be changed. The reason for that is very simple. In virtually all of the lower court cases which have reached a judgment on this issue, the legislative history of the 1949 Act has been totally unhelpful to the government in defending its constitutionality.

"The reason for that is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature.

* * * * *

"The issue is now back before Congress, and speaking solely for the Department of Justice as litigator, it should be fairly obvious to this committee that the defensibility of the all male draft is something which Congress perhaps should speak out clearly and formulate the kind of record if, indeed, it chooses to reject the Administration's proposal, which will be helpful rather than hurtful in the litigation." Joint Appendix at 218, 220-21.

the Subcommittee Report contains no recommendation that the registration provisions in the 1948 MSSA, as amended, ought to be repealed and reenacted on the basis of the new Findings made by the Subcommittee. Rather, it simply contains several pages of Findings which attempt to provide a post-hoc justification for the exclusion of women from draft registration.

Subsequently, the Senate Armed Services Committee reported out the Department of Defense Authorization for Appropriations for FY 1981, which included a provision for the transfer of funds for registration of men only. While the report specifically adopted the Findings of the Senate Subcommittee, S. Rep. No. 826, 96th Cong., 2d Sess. 156-61 (1980), these Findings and the provisions relating to the transfer of funds were superfluous; the House and Senate had already passed H.R.J. Res. 521 which provided for the transfer of funds for resumption of the all-male registration process. In addition, the House Conference Report on the defense appropriations act, H. Conf. Rep. No. 1222, 96th Cong., 2d Sess. 104 (1980), only appeared after the district court had struck down the registration provisions in the MSSA as unconstitutional, and apparently adopted the Findings of the Senate Subcommittee for the specific purpose of influencing this litigation.[15] There is no indication in either

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[15] As in the case of the Senate Armed Services Committee Report, the Conference Committee had no other reason to mention the issue of draft registration since funds had already been provided for it in H.R.J. Res. 521.

Moreover, it is significant under *TVA* v. *Hill* to note that in a 242 page Senate Armed Services Committee Report on the defense appropriations act, the statement rejecting the registration of women is tucked neatly in a few pages in the middle of the extensive report. And, in the 106 page House Conference Report, the only statement regarding women and registration appears on page 104 of the Report:

> "The conferees endorse the Specific Findings on registration of women contained in the Senate report."

lengthy and ponderous report that the committees were endorsing a repeal and reenactment of the all-male registration provisions of the MSSA for the new reasons stated in the Findings. Moreover, as this Court pointed out in *TVA* v. *Hill*, statements in committee reports " 'however explicit, . . . cannot serve to change the legislative intent of Congress expressed before the [Endangered Species] Act's passage.' " 437 U.S. at 193.[16]

A review of the debates in both the House and Senate on H.R.J. Res. 521, providing funds for resumption of registration, further refutes the Government's argument. Indeed, the debate in the House on April 22, 1980, consumed less than four hours and focused on whether resumption of premobilization registration was either necessary or an effective way of responding to several recent aggressive actions by Russia, including the invasion of Afghanistan.[17] Although an amendment to provide funds for the registration of women as well as men was intro-

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[16] Additional hearings on the "Judiciary Implications of Draft Registration—1980" were held on April 14 and May 22, 1980 by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary. While several Administration witnesses testified regarding the constitutionality of the all-male draft provisions of the MSSA, no one suggested that by appropriating funds for resumption of draft registration Congress would implicitly repeal and reenact the MSSA for nondiscriminatory reasons. *See, e.g.*, testimony of Dr. Bernard Rostker, Director of the Selective Service System, and Ezra H. Friedman, Office of Legislation of the Justice Department's Criminal Division, *Judiciary Implications of Draft Registration—1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (April 14 and May 22, 1980).

[17] Cong. Rec. H2704-2753 (daily ed. April 22, 1980); S6331 (daily ed. June 5, 1980) ("The House of Representatives spent only 1 day. That means they spent about 2 or 3 hours debating this resolution before they approved it.").

duced during the debate,[18] it was quickly rejected since there was no authority in the MSSA to register women and the only issue before the House was whether funds ought to be appropriated to resume the registration process authorized under the statute.[19]

As in the House, the debates in the Senate, which consumed nearly a week in June, 1980, centered on whether there was any advantage—real or psychological—to be gained from resumption of premobilization registration under the MSSA, and whether it was worth the financial and social costs.[20] Again, there was no discussion of whether changes in any aspect of the authorizing legislation were necessary in order to assure the constitutionality of the all-male registration process. Rather, the debates made clear that the Senators assumed that authority to resume registration existed in the MSSA and the only issue under consideration at that time was whether funds should be appropriated to enable the President to resume the exercise of that authority. Thus, Senator Dole pointed out:

> "The President already has the statutory authority to reinstitute registration for males between the

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[18] Cong. Rec. H2728 (daily ed. April 22, 1980):

> "Mr. Duncan of Oregon: Mr. Chairman this is an amendment to the amendment that is offered in order to present to the Congress the entire program which the President has requested of this Congress. It is to appropriate a sufficient amount of money to initiate a draft registration, not only for men, but also for women."

[19] *See, e.g.*, Cong. Rec. H2729, H2730, H2743 (daily ed. April 22, 1980). Thus Congressman Montgomery stated: "[T]he Duncan amendment, even if it were adopted today could not be implemented by the president, because there is no authorization for women to be registered. . . . Therefore, it is out of order." Cong. Rec. H2729.

[20] *See* Cong. Rec. S6227-6250 (daily ed. June 4, 1980); S6314-6339 (daily ed. June 5, 1980); S6392-6398 (daily ed. June 6, 1980); S6461-6486 (daily ed. June 9, 1980); S6506-6555 (daily ed. June 10. 1980); S6557-6611 (daily ed. June 11, 1980); S6736-6773 (daily ed. June 12, 1980).

> ages of 18 and 26. He has only to come to the Congress for the appropriations needed to begin the male registration procedure. The registration section of the Military Selective Service Act, suspended for the past few years, is the source of the President's authority." Cong. Rec. S6319 (daily ed. June 5, 1980).

Even during the brief floor debate over the Kassebaum-Levin Amendment which would have limited the use of appropriated funds to registration of both men and women,[21] it is clear that the Senate was not aware of nor did it intend by appropriating funds for registration—with or without the amendment—to effect in any way the MSSA or the President's authority under that statute. Indeed, as Senator Nunn pointed out, if the amendment passed it would not have implicitly modified the MSSA to require the inclusion of women in the registration process; rather, Congress would have then had to enact specific legislation authorizing the registration of women. *See* Cong. Rec. S6544 (daily ed. June 10, 1980).

There is thus simply no basis in the legislative history for this Court to conclude that by appropriating funds for resumption of the all-male registration process authorized by the MSSA, Congress in fact reconsidered and repealed the discriminatory 1948 MSSA only to reenact it "in the blink of an eyelash" in its exact form but for new and allegedly nondiscriminatory reasons. Rather, in 1980 Congress simply appropriated funds for resumption of the all-male draft, authorized by the 1948 MSSA, as amended. Moreover, it provided, at the specific request of the Department of Justice, some post-hoc legislative history to justify the discriminatory provisions of the MSSA. This Court should, in assessing the constitutional adequacy of reasons for excluding women from the registration process under the 1948 MSSA, give no weight

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[21] Cong. Rec. S6527 (daily ed. June 10, 1980).

to such post-hoc rationalizations. *Craig* v. *Boren*, 429 U.S. 190, 199 n.7 (1976); *see* discussion in Appellees' Motion to Affirm at 36-37.

CONCLUSION

For the reasons stated above, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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March 2, 1981

No. 80-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,

Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,

Appellees.

BRIEF OF *AMICI CURIAE*, CONGRESSMAN LAWRENCE P. McDONALD, CONGRESSMAN NEWT GINGRICH, CONGRESSMAN JOHN M. ASHBROOK, SENATOR JAKE GARN, SENATOR ORRIN G. HATCH, AND THE WASHINGTON LEGAL FOUNDATION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,

Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,

Appellees.

BRIEF OF *AMICI CURIAE*, CONGRESSMAN LAWRENCE P. McDONALD, CONGRESSMAN NEWT GINGRICH, CONGRESSMAN JOHN M. ASHBROOK, SENATOR JAKE GARN, SENATOR ORRIN G. HATCH, AND THE WASHINGTON LEGAL FOUNDATION.

INTERESTS OF *AMICI*

Congressman Lawrence P. McDonald is a United States Representative from the 7th District of the State of Georgia.

Congressman John M. Ashbrook is a United States Representative from the 17th District of the State of Ohio.

Congressman Newt Gingrich is a United States Representative from the 6th District of the State of Georgia.

Senator Jake Garn is a United States Senator from the State of Utah.

Senator Orrin G. Hatch is a United States Senator from the State of Utah.

The United States Senators and Congressmen seek to file an *amicus* brief in this suit because it raises vital issues of great interest, among which is whether Section 3 of the Military Selective Service Act, which authorizes draft registration of male citizens only, is constitutional. The Senators and Congressmen seek to protect their constitutional prerogatives under Art. I, Section 8, including Congress' power to establish and maintain the United States armed forces.

This case is of fundamental importance, concerning as it does, the defense and security of our country and its citizens. As duly elected representatives of the citizens of their respective districts and states, the *amici* seek also to advance and protect the interests of their constituents to be able to live securely in a United States that has a strong national defense and a military that is prepared to meet military emergencies, enemy aggression, and threats to world peace.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz*, 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild*, Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979).

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. WLF's concern in this case is to present to the Court aspects of the public interest not presently represented.

The Washington Legal Foundation finds that selective service registration of males only is a constitutional exercise to raise and support armies pursuant to Article I, Section 8 of the Constitution and that public interest and policy considerations dictate that registration of males only is appropriate.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the statement of the facts in the appellant's Jurisdictional Statement ("Jurisdictional Statement") at 1-7.

SUMMARY OF ARGUMENT

This case involves the constitutionality of sections 453 and 454(a) of the Military Selective Service Act providing for selective service registration of males only. 50 U.S.C. App. §§453,454(a). The three-judge district court below struck down the statutes ruling that registration which excluded women was a violation of equal protection as embodied in the Due Process Clause of the fifth amendment. Jurisdictional Statement at App. 43a.

Amici maintain that the selective service registration of males only is a constitutional exercise of Congressional prerogative to raise and support armies pursuant to Article I, Section 8 of the Constitution. Furthermore, the three-judge district court erred in applying the "important governmental interest" test to this case which involves military preparedness and national security—areas in which the less strict "rational basis" test is the proper measure to determine the constitutionality of a statute.

Even assuming, *arguendo*, that the Act is judged under the more stringent measure of important governmental interests, *amici* submit that the Act passes constitutional muster. Congress' determination to implement registration of only males furthers the vitally important governmental purpose of ensuring military preparedness and securing the national defense. The Courts should not substitute their judgment for that of Congress in determining the manner in which to provide for the national

defense. Congress has acted within its constitutionally delegated powers and therefore this Court must rule that registration of males only is valid.

ARGUMENT

I.

THE SELECTIVE SERVICE REGISTRATION OF MALES ONLY IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL PREROGATIVE TO RAISE AND SUPPORT ARMIES PURSUANT TO ARTICLE I, SECTION 8 OF THE CONSTITUTION.

In the present case plaintiffs challenge the constitutionality of the selective service registration of males only, as provided for in the Military Selective Service Act. 50 U.S.C. App. §§453, 454(a). Plaintiffs argue that their rights to equal protection of the laws, as embodied in the Due Process Clause of the fifth amendment, are violated in that only males are subject to registration for the draft. Jurisdictional Statement at 6. Plaintiffs claim that they are harmed by this gender classification and that it cannot be justified under applicable standards of constitutional review. Jurisdictional Statement at 5,6.

A. The proper standard of judicial review in analyzing cases involving military preparedness is the reasonable basis test and the selective service registration of males only passes scrutiny under that test.

The Supreme Court has established three standards of review which may be applied in analyzing a discriminatory classification under the Equal Protection Clause and the fifth amendment to the Constitution. The first test requires that statutory classifications based on sex must bear a reasonable relationship to a permissible governmental purpose. *See Schlesinger v. Ballard*, 419 U.S. 498

(1975). The second test determines that a statutory classification based on sex is unconstitutional unless it is substantially related to an important governmental interest. *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The third test finds that "suspect" classifications such as those based on race, religion, or other fundamental rights will be held unconstitutional unless they are related to a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The three-judge district court below properly found that the third test requiring a compelling state interest is not applicable and that a gender based classification does not trigger the highest level of scrutiny. Jurisdictional Statement at App. 16a.

The three-judge district court did determine that the intermediate test requiring an important governmental interest was applicable and found there was no important governmental interest to justify the exclusion of women from registration. Jurisdictional Statement at App. 22a. The Court erred in its determination by failing to make the distinction between cases involving monetary compensation and cases involving military preparedness and national defense. The three-judge district court simply found that every case involving a gender-based classification automatically triggers the important governmental interest test.

Amici submit, however, that the proper standard of review in analyzing the selective service registration of males only and other cases involving military preparedness and national security is the rational basis test. This test requires that a statutory classification based on sex need only bear a reasonable relationship to a permissible governmental purpose. Further, *amici* maintain that ap-

plication of the rational basis test demonstrates that male only registration is constitutional.

Article I, Section 8 of the U.S. Constitution commits exclusively to Congress the powers to "raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I §8, cls. 12-14. This power exists in peacetime as well as war. *Bertelsen v. Cooney*, 213 F.2d 275, 277 (5th Cir.), *cert. denied* 348 U.S. 856 (1954). The power is plenary. Thus, it is not for the judiciary to review legislative branch determinations as to what military strength is necessary for the safety of our nation or how such strength is to be raised or composed. *Id.* at 277; *United States v. Macintosh,* 283 U.S. 605 (1930).

Congress may exercise this plenary authority in all areas in which it has substantive legislative jurisdiction as long as the exercise of that authority does not offend some other constitutional provision or fundamental right. *See United States v. Ballin,* 144 U.S. 1, 5 (1892); *Buckley v. Valeo*, 424 U.S. 1 (1974). This is the only limitation on Congress' delegated constitutional authority.

This court has historically shown great deference to Congress' authority to raise and support armies under Article I, Section 8 of the Constitution and has emphasized that the responsibility for determining how best our armed forces shall fight or be ready to fight rests with Congress and not with the courts. *Schlesinger v. Ballard,* 419 U.S. 498, 510 (1975); *Toth v. Quarles,* 350 U.S. 11, 17 (1955).

In *Schlesinger v. Ballard*, 419 U.S. 498 (1975) the Court upheld the constitutionality of a statutory scheme which at that time treated men and women naval officers

differently for the purposes of promotion. In reaching its decision, the Court stated:

> This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise' . . . The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, *see* U.S. Const., Art. I. Section 8, cls. 12-14, and with the President. See U.S. Const., Art. II, Section 2, cl. 1. We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the fifth amendment.

Id. at 510.

In *Ballard* the Court recognized the great deference which must be given Congress when raising armies and providing for the defense of our nation. *Id.* at 510. The Court looked only to whether the different treatment of men and women was rational in relation to national defense needs and military preparedness. *Id.* at 508, 509.

The problems faced by Congress in determining whether to draft men but not women, as in other instances involving national defense needs and military preparedness, are altogether different than the policy considerations which led to the laws and regulations reviewed in cases like *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Reed v. Reed*, 401 U.S. 71 (1971), and *Craig v. Boren*, 429 U.S. 190 (1976).

In *Reed v. Reed*, 401 U.S. 71 (1971) the Court held unconstitutional a statute preferring men over women in the appointment of administrators of estates. The Court found that the sole purpose for the statute was administrative convenience and held that this would not justify disparate treatment under the Constitution.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973) the Court held unconstitutional a statute which provided that for the purpose of obtaining increased quarters allowances and medical and dental benefits, a serviceman may claim his wife as a dependent whether or not she actually is dependent, while a servicewoman may not claim her husband as a dependent unless she actually proves he is dependent. The Court, in a plurality opinion, found this disparity of treatment constitutionally invalid, stating:

> [A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience . . . involves the very kind of arbitrary legislative choice forbidden by the [Constitution].

Id. at 76, 77.

In both *Reed* and *Frontiero* the statutes in question failed constitutional scrutiny because they did not advance an important governmental interest. In addition, these cases did not involve military preparedness and there was no explanation or justification for the differences in treatment.

In *Craig v. Boren*, 429 U.S. 190 (1976) plaintiffs challenged an Ohio statute prohibiting the sale of beer to males under the age of 21 and females under the age of 18 as a violation of equal protection. The Supreme Court, in a plurality opinion, struck down the statute stating, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

The distinguishing characteristic between the cases employing the important governmental interest test, such as *Craig v. Boren, Id.*, and those employing the rational basis test is that the former cases involved questions of

financial compensation while the latter cases presented questions of military preparedness. This distinction is very important considering the deference shown Congress in cases involving use of Article I, Section 8 power to raise armies and prepare for national emergencies.

Accordingly, in *Campbell v. Beaughler,* 519 F.2d 1307 (9th Cir. 1975) the Ninth Circuit upheld a Marine Corps regulation prescribing different rules for men and women with regard to hair length and wigs. The Court, applying a rational basis test, found that a prohibition of the use of wigs for men was rationally related to safety in combat and that the disparate treatment of men and women was reasonable because women do not serve in combat. The Court specifically noted that "the military has a right to govern its affairs without . . . intervention from the judiciary." *Id.* at 1309.

In *United States v. Reiser*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976), the United States appealed from an order of the U.S. District Court dismissing the indictment of the defendant for failing to submit to induction into the armed forces. The Court of Appeals held that the Military Selective Service Act did not deny due process or equal protection because it subjected men, but not women, to registration and induction into the armed forces, since there is a clear rational relationship between the government's legitimate interests and classification by sex.

Accordingly, in the present case the standard to be applied is a rational basis test because the question of selective service registration for males only arises in the context of military preparedness. Here, the all-male registration is certainly reasonably related to the purpose of raising a combat-ready and effective and efficient armed service. *See Falbo v. United States,* 320 U.S. 549, 554

(1944). In addition, it is not challenged that women do not serve in combat-ready roles, so that there is ample justification for making a distinction in the context of military preparedness.

In *Gillette v. United States*, 401 U.S. 437 (1971), one appellant objected to participation in the Vietnam War because of pacifist convictions, the other because he thought the Vietnam War was an unjust war under Catholic doctrine. Neither appellant would refuse to serve in wars he considered wars of national defense. *Id.* at 440. The Supreme Court recognized that it was well within the power of Congress to distinguish between those who object to only particular wars on the basis of religious or pacifist convictions and those who object to all wars on the basis of religious or pacifist beliefs.

The *Gillette* case demonstrates the deference shown Congress when exercising its power pursuant to Article I, Section 8. The distinction based on religious beliefs for military necessity clearly parallels the distinction based on sex in the present case. Congress has determined that for the purpose of military preparedness it is necessary to institute registration of males only at this time. Pursuant to the rule in *Gillette* that decision must be upheld.

The Supreme Court has applied a rational basis standard in several first amendment cases arising in the military context. The all-male selective service registration is consistent with and analogous to these cases. In *Greer v. Spock*, 424 U.S. 828 (1976), the Supreme Court upheld a ban on speech and demonstrations on military bases which would have been permissible in civilian life. The Court recognized that the primary function of the military is to fight and be ready to fight and noted the "special constitutional function of the military in our national life." *Id.* at 837.

In the recent case of *Brown v. Glines*, 100 S.Ct. 594 (1980) the Court upheld regulations requiring Air Force personnel to obtain approval from commanders before circulating petitions on the base against a challenge that the regulations were a violation of first amendment rights. The Court did not require the government to demonstrate a compelling interest which would have been required in a civilian setting. But rather, the Court approved of the regulations as "reasonably necessary" for discipline, moral, and military effectiveness. *Id.* at 600.

Hence, the courts have traditionally and consistently shown great deference to Congress when reviewing legislation enacted pursuant to Article I, Section 8 of the Constitution. This deference, taken together with case law confronting the issue of military preparedness requires that a rational basis test be applied to determine the constitutionality of the selective service registration of males only. When applying the rational basis test it is clear that the all-male registration is reasonably related to the governmental purpose of establishing an effective and efficient combat-ready army.

It is also important to emphasize that it is not proper for the Court to substitute its judgment for that of the Congress when reviewing decisions involving the raising of armies pursuant to Article I, Section 8 of the Constitution. The Constitution has expressly delegated this power to Congress and any action by the Court to rule the registration of males only invalid will be an impermissible usurpation of that power.

Since, as we demonstrate below, the all-male registration passes muster under the more stringent important governmental interest test, it certainly survives scrutiny under the rational basis test.

B. Assuming *arguendo*, that the district court was correct in employing the more stringent test of "important governmental interest," the registration of males only passes scrutiny under that test.

The selective service registration of males only is constitutional, even assuming *arguendo* that the Act is judged under the more stringent standard applicable to analysis of gender-based discrimination in non-military contexts.

A primary purpose of the Military Selective Service Act is to "insure the security of this Nation." 50 U.S.C. §451(b). Congress is expressly empowered by Article I, Section 8 of the Constitution "to declare war." U.S. Const. art I §8, cl. 11. This power "necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise . . . armies,' which necessarily connotes the like power to say who shall serve in them and in what way." *United States v. Macintosh*, 283 U.S. 605, 622 (1930). It is crucial to the security of this nation to be able to mobilize "national manpower in the shortest practical period" with maximum effectiveness. *Falbo v. United States*, 320 U.S. 549, 554 (1944). It is the primary business of our armies "to fight and to be ready to fight." *Greer v. Spock*, 424 U.S. 828 (1976); *Toth v. Quarles*, 350 U.S. 11 (1955). The Courts have consistently recognized the importance of a strong national defense. *See United States v. Macintosh*, 283 U.S. 605 (1930); *Falbo v. United States*, 320 U.S. 549 (1944); *Toth v. Quarles*, 350 U.S. 11 (1955).

When Congress decided to reinstitute registration it was done, in part, in response to the Soviet invasion of Afghanistan. Jurisdictional Statement at 3. At that time

the President and Congress determined that male only registration was necessary to preserve and enhance our national security interests. Congress determined that it was vitally necessary to initiate registration but determined that it was not proper to register women at that time. *Id.* at 4. Congress based its decision, in part, on the Report of the Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act. *See* 94 Cong. Rec. S6531 (daily ed. June 10, 1980) (remarks of Sen. Warner). The Subcommittee found that while women play an important role in the military, it would not be in national defense and security interests to register women at that time. 94 Cong. Rec. S6531 (daily ed. June 10, 1980) (Report of the Subcommittee on Manpower and Personnel of Senate Armed Services Committee). The Subcommittee determined that women should not register and men should because of current manpower shortages, and the need to rotate personnel from non-combat to combat positions. *Id.* at S6532.

The determination to implement the selective service registration of males only was done to further the vitally important government purpose of ensuring military preparedness and securing the national defense by organizing military forces in the most efficient and effective manner. This action of Congress would certainly pass scrutiny even under the more stringent test of "important governmental interest" as set forth in *Craig v. Boren*, 429 U.S. 190 (1976).

Three distinguished law professors from Yale University Law School recently sent a letter to Senator Sam Nunn concerning the constitutionality of registration for males only, stating:

A Congressional decision to conscript men but not women would be upheld under the most severe and suspicious version of the constitutional test. The issue is rooted in the nature of the problem of organizing military forces capable of victory under contemporary circumstances. The case for conscripting men only would overcome any burden of proof, however phrased.

* * * * *

If the Constitution should be interpreted to require Congress to treat men and women alike in the draft, Congress would have to draft far more women than it needs to staff non-combat jobs in the military. As a result, the equal drafting of men and women would cause great and unnecessary disruption to no purpose that could not be served better by the enlistment of women in appropriate numbers for non-combat service.

* * * * *

We can see no constitutional obstacle to the proposition that Congress may enact laws providing for the conscription of men for military service without conscripting women. The conflicting interests Congress must balance in making this fundamental judgment cannot be compared to those at issue in cases dealing with gender based discrimination in welfare systems, the administration of estates, establishing the age at which people may drink liquor in public, or the other controversies which have been litigated.

94 Cong. Rec. S6533 (daily ed. June 10, 1980) (Letter to Sen. Sam Nunn from Joseph W. Bishop, Jr., Robert H. Bork, and Eugene V. Rostow, Professors of Law, Yale University Law School).

The above quotations emphasize the importance and special significance of Congress' power in the area of national defense. The determination which Congress made was based on contemporary military needs and requirements in order to be militarily prepared for any national emergency. It is certainly in the best interests of all citizens that Congress be permitted to carry out the duties expressly delegated to it by the Constitution in order to ensure the safety of this nation.

As a matter of public policy this Court must reverse the three-judge district court. If this Court affirms the lower court decision there will be very serious and detrimental ramifications. The Court would then be faced with such questions as whether women and men must be drafted in equal numbers and whether women must be placed in combat roles. The judiciary would be in the position of directing how our armed forces should prepare for national defense. This is contrary to the express intent of the Constitution and clearly not in the best interests of our national security.

CONCLUSION

The Constitution has delegated Congress the power to raise armies. U.S. Const. art. I, §8, cl. 12. This Court should not substitute its judgment for that of Congress in determining the manner in which to provide for the national defense. The public interest demands that the citizens of this country be able to live securely in a United States which has a strong national defense and armed forces prepared to meet military emergencies, enemy aggression, and threats to world peace. Congress has determined that in the important interests of national defense the selective service registration of males only is

appropriate at this time. *Amici* urge this court to uphold the selective service registration of males only as a constitutional exercise of Congress' Article I, Section 8 powers.

Respectfully submitted,

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No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE MEN'S RIGHTS, INC.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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BERNARD ROSTKER,
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APPELLANT

v.

ROBERT L. GOLDBERG, et al.
APPELLEE

ON APPEAL FROM THE UNITED STATES
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DISTRICT OF PENNSYLVANIA

AMICUS BRIEF OF MEN'S RIGHTS, INC.
Frederic Hayward, Director

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER,
DIRECTOR OF SELECTIVE SERVICE,
APPELLANT

v.

ROBERT L. GOLDBERG, et al.
APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

AMICUS BRIEF OF MEN'S RIGHTS, INC.

This brief is being filed with the consent of both parties.

INTERESTS OF THE AMICUS

Men's Rights, Inc. is a non-profit corporation deeply concerned with sexist attitudes and their impact upon American males. We are dedicated to the elimination of sexual prejudice and discrimination in all facets of our society. We find that the idea that protection is a MALE responsibility, as well as the idea that homemaking is a FEMALE responsibility, are the dual foundations of sexism. All-male draft registration

encourages -- indeed, enforces -- the stereotypes and roles which make sexism inevitable.

Men's Rights, Inc. believes that it is impossible to divide our society, racially or sexually, in a separate but equal fashion. In addition, we do not believe that women are inherently weak or dependent. Whatever reasons exist for excusing women from performing the tasks associated with registration will also be valid for large numbers of men and invalid for large numbers of individual women. To excuse all women, but no men, is not only contrary to our interest in utilizing all potential resources, but it is also contrary to our principle of equal protection.

The logic that excludes women from draft registration is the same logic that stereotypes women and relegates them to a position of caretaker for the home and hearth. It is the force which burdens men with the responsibility of military defense that incorrectly characterizes them as incapable of nurturing the physical, psychological, and emotional needs of their children.

Men's Rights, Inc. firmly believes that the Battle of the Sexes is an unhealthy situation. Inter-sex resentment and competition is the inevitable result of forcing males and females into limiting roles. The chasm between male and female experience is a major block to male-female understanding.

Our concern is for the equal protection of all people, white or black,

male or female. Our concern is for the equality and harmonious coexistence of the sexes. An all-male draft would teach us that male life is more expendable and that the male mentality is more militaristic than its female counterpart. We believe, however, that all life is equally precious, and that a military draft which specifically excludes females fails to consider the significant contribution women now make to our military, thus bypassing an enormous resource available to protect and to serve.

I. ISSUES PRESENTED FOR REVIEW

Did the lower court err as a matter of law in determining that the exclusion of women from the Military Selective Service Act was not substantially related to an important governmental function, and thus, violative of the United States Constitution?

II. STATEMENT OF THE CASE

In the interests of judicial economy, Amicus hereby adopts by reference the statement of the case set forth in appellee's brief.

III. SUMMARY OF ARGUMENT

Male-only draft registration is a gender-based classification which must necessarily be scrutinized in accordance with recent cases decided by this Court. The standard applicable to male-only draft registration is set forth in Craig v. Boren, 429 U.S. 190 (1976).

> Classifications by sex must serve important governmental objectives and must be substantially related to those objectives. (Id. at 197)

The decision of the government to subject only men to draft registration and automatically to exclude all women denies equal protection and is thus violative of due process unless it passes the heightened scrutiny standard of review articulated in Craig.

Although the appellant asserts that deferential scrutiny should be accorded to male-only registration, since it is "geared to national defense needs," they cite no case which wupports this extraordinary exception. Their reliance upon Schlesinger v. Ballard, 419 U.S. 498, is misplaced since that case is inapposite to the case at bar. Ballard does not, in fact, articulate such a standard and their reliance ignores the decision of this Court in Frontiero v. Richardson, 411 U.S. 677 (1973).

In Frontiero, this Court engaged in the heightened scrutiny set forth in Craig in striking down a gender-based discrimination in the compensation scale for military personnel. Frontiero controls in the case at bar, and the application of the heightened scrutiny standard by the lower court was correct.

The decision of Congress, in 1948, to authorize the registration of men but not of women cannot withstand the heightened scrutiny required in gender-based classification cases. The post hoc

rationalizations of the Subcommittee on Manpower and Personnel, S Rep. 96-826, should not be considered by this Court in assessing the constitutional adequacy of reasons for the exclusion of women from registration in a 1948 statute. Craig v. Boren, 429 U.S. at 199 n. 7.

Even if this Court were to consider those rationalizations, they would not be supported by the overwhelming weight of the evidence in the District Court. President Carter, the Director of Selective Service (the appellant), and the Undersecretary of Defense have all gone on record in support of female as well as male registration. No mention was made by these individuals, at the time of their support for registering both sexes, of concerns with decreased military flexibility.

The profferred rationale for the total exclusion of women from registration is that it enhances military flexibility. In other words, women would be in the way when the fighting started. The Amicus asserts that this rationale is specious and fails to consider the increasing significance of women in today's military.

The Amicus submits that the District Court decision should be affirmed since it correctly found that there was no substantial relationship between male-only registration and the governmental interest in increased military flexibility. Male-only registration is a subterfuge for archaic conceptualizations and stereotypes with respect to the roles of men and women in our society. These

conceptualizations and stereotypes are "raison d'etre" behind the total exclusion of females from draft registration. As a result the MSSA denies equal protection and violates due process.

IV. ARGUMENT

A. MALE-ONLY REGISTRATION MUST PASS THE HEIGHTENED SCRUTINY APPLIED TO GENDER DISCRIMINATION CASES.

The District Court "combed the record and the legislative history for purported justifications for the total exclusion of women from the MSSA" and found each proffered justification unconvincing (Jur. St. 232). It held that the male-only draft registration mandate, therefore, failed to meet the heightened standard of review for gender-based classification first enunciated by this Court in Craig v. Boren, 429 U.S. 190 (1976). Appellant acknowledges that gender-based classifications must ordinarily be judged under this standard (Jur. St. 8-9) but appellant then attempts to avoid the Craig standard in the case at bar by carving out an exception for "statutory classifications geared to national defense needs", where the deferential "rational relationship" scrutiny would apply (Jur. St. 7-8).

Appeallant's argument rests solely on the inapposite Schlesinger v. Ballard, 419 U.S. 498 (1975), and virtually ignores Frontiero v. Richardson, 411 U.S. 677 (1973). On analysis both cases, as well as this Court's other precedents, demonstrate that the District Court's application of the heightened standard,

enunciated in Craig and applied consistently to test gender classification since 1976, was correct.[1]

1. GENDER-BASED CLASSIFICATIONS ARE APPROPRIATELY JUDGED UNDER A STANDARD OF HEIGHTENED SCRUTINY.

Since Craig v. Boren, 429 U.S. 190 (1976), there has been but one test for gender-based classifications. In Craig, this Court stated that "to withstand constitutional challenge, ... classifications by sex must serve important governmental objectives and must be substantially related to those objectives." 429 U.S. at 197.

Starting with Reed v. Reed, 404 U.S. 71 (1971), this Court held that rationally serving "legitimate objectives (reducing the workload of Probate Courts and avoiding familial controversies) was not important enough to justify gender-based classifications." Furthermore, in Frontiero v. Richardson, 411 U.S. 677 (1973), as appellant concedes, the standard of heightened scrutiny was applied to a statute governing personnel matters entirely internal to the military. (Jur. St. 8).

This Court has repeatedly reaffirmed the principle that gender-based legislation must be tested by this more stringent standard.[2] The Court has applied two

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[1]Wengler v. Druggists' Mutual Insurance Co., 446 U.S. 142 (1980), Califano v. Webster, 430 U.S. 313, 317 (1976).

[2]Califano v. Westcott, 443 U.S. 76, 89

basic principals to gender classifications. First, over-generalizations concerning one sex or another cannot be substituted for gender-neutral means of distinguishing classes of individuals. Califano v. Goldfarb, 430 U.S. at 88 (1977). Second, the Court has consistently rejected the use of gender as a substitute for need in furthering even important legislative objectives.[3]

Finally, with respect to gender-based classifications, this Court has most recently held that the "burden is on those defending the discrimination to make out the claimed justification". Wengler v. Druggists Mutual, 100 S.Ct. at 1546.

Therefore, the Amicus submits that the unanimous and overwhelming weight of stare decisis clearly establishes that gender-based classifications are appropriately judged by a standard of heightened scrutiny, and that the appellant's contention that minimal scrutiny is applicable is without foundation and against the legal precedent of this Court.

(1979) Orr v. Orr, 440 U.S. 268, 279 (1979), see also Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979).

[3]See Orr v. Orr (Alabama alimony statute imposing burden solely upon husbands).

2. SCHLESINGER V. BALLARD NEITHER APPLIES NOR SUPPORTS THE APPLICATION OF THE RATIONAL RELATIONSHIP TEST TO GENDER DISTINCTIONS IN THIS CONTEXT.

Appellant relies upon Schlesinger v. Ballard, 419 U.S. 498 (1975), as authority for the application of the rational basis standard. The government argues that this was the standard applied therein. In the lower court, however, the government more accurately characterized Ballard as a case where "the Court did not specify the standard of review it was applying" (R 1070-71).

In Ballard, this court upheld a federal statute whereby naval men with more than 9 years of active service, but not women, were subject to mandatory discharge upon their being passed over for promotion. Women could serve 13 years before being subject to discharge for lack of promotion.

At trial, the government urged Ballard as supporting a rational basis test in cases involving military matters. After careful anlysis, the District Court correctly rejected that argument. As the District Court noted, Ballard was a case where (1) there was no disparate treatment of similarly situation individuals, and (2) the Supreme Court expressly rejected administrative convenience as a basis for different treatment of even dissimilarly situated males and females.

If Ballard supported appellant's reading, it would have overruled Frontiero. Frontiero, however, remains as a vital

precedent cited by this Court in both Ballard, 419 U.S. at 506, and Craig, 429 U.S. at 198.

Ballard does not govern in the instant case; Frontiero does. In Frontiero, this Court declared unconstitutional certain laws under which military men received a housing allowance and health care for their wives, even though military women received these benefits only if the women supplied over three-quarters of the couple's support. Although these laws were within the Congressional power to raise and support armies, Article I §8 cl. 12, appellant concedes that heightened scrutiny was applied in rejecting the sex discrimination of those laws. (Jur. St., 8).

Appellant has attempted to distinguish Frontiero on the ground that this statute related to financial compensation only and not to military preparedness. (Jur. St., 9, 10). This distinction fails to consider the significance of compensation and family living conditions upon military preparedness. Certainly the security of better pay and living conditions enhances morale and thus preparedness as much as do promotions. The law in Frontiero which this Court subjected to a heightened standard of review represents a larger infringement into the workings of day-to-day military affairs than the registration of males under MSSA.

A thorough analysis of Ballard reveals that it does not stand for the proposition set forth by the appellant. Frontiero controls, and that case is consistent with the subsequent decisions

of this Court concerning gender-based classifications.

3. THE ADDITIONAL CASES CITED BY THE APPELLANT ARE INAPPOSITE AND FAIL TO SUPPORT THEIR ARGUMENT FOR MINIMAL SCRUTINY.

The government's analogy to First Amendment cases arising in defense contexts (Jur. St., 10) fails to support minimal scrutiny for male-only registration. While it is true that considerations of military discipline and morale may justify a reduction in a soldier's First Amendment rights, those cases cited by the appellant involve matters wholly internal to the military.

For example, Brown v. Glines, 444 U.S. 348 (1980), was a challenge to Air Force regulations that required command approval before the circulation of petitions on Air Force Bases. This case is inapposite to the case at bar in that draft registration applies to civilians, not soldiers subject to discipline, transfer and military rules and regulations.

Greer v. Spock, 424 U.S. 828 (1976), is another case cited by the appellant which is readily distinguishable from the instant case. It involved a ban on political speeches on military bases. As in Glines, the First Amendment was involved and not due process or equal protection. Furthermore, the regulations involved were totally within a military context and entwined with discipline and the abdication of rights necessary thereto. It is distinguishable from the case at

bar in both its focus (First Amendment) and its context.

The appellant cites a series of cases in its brief seeking to justify the employment of the minimal standard whenever the war power of Congress is called into question (e.g., U.S. v. Robel, 389 U.S. 258 (1964)). An examination of these cases, however, clearly establishes that they involve substantive challenges to rules concerning military discipline, an area of extraordinary concern of the military.[4]

A brief recitation of their facts reveals how easily they can be distinguished from the case at bar. Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (Command approval for petitions by military personnel); Middendorf v. Henry, 425 U.S. 25 (1976) (Summary court martial challenged on Sixth amendment grounds); Parker v. Levy, 417 U.S. 733 (1974) (Due process challenge to court martial for conduct unbecoming an officer); Burns v. Wilson, 346 U.S. 137 (1953) (Due process challenge to court martial); Orloff v. Willoughby, 345 U.S. 83 (1953) (Inductee seeking judicial review of his duty assignment).

The case cited in the appellant's brief which is most relevant to the case at bar is Korematsu v. U.S., 325 U.S. 214 (1944). This case dealt with an equal

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[4]See Schlesinger v. Councilman, 420 U.S. 755, 757 (1975).

protection challenge to civilian exclusion order #34 (which forbade persons of Japanese ancestry to remain in "military areas"). Even though the Court upheld the order, it ruled that this order was subject, nevertheless, to the "most rigid scrutiny" 325 U.S. at 216.

Thus, the untenable nature of the appellant's profferred standard of review is underscored by the total lack of precedent supporting it. To cite case after case involving purely intramilitary fact situations as having a bearing upon the constitutionality of civilian draft registration demonstrates that the heightened scrutiny applied to gender-based classifications must be applied in the case at bar.

Finally, should appellant's standard of review seeking the undemanding examination of classifications be applied, it could open the door to legislation pursuant to the war power which could discriminate on the basis of race or national origin.

In a context where so many liberties are involved, male-only draft registration must be reviewed in accordance with the precedent of Reed, Frontiero and Craig.

B. THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED SINCE THE RECORD DISCLOSES NO JUSTIFICATION FOR MALE-ONLY REGISTRATION IN THE MSSA.

It is uncontentested that when Congress enacted the MSSA in June 1948, it gave no explicit consideration as to whether male-only registration was more or less effective than a registration including women. The Government has, in fact, conceded that the exclusion of females from registration has not been considered in any of the statutory history of the Military Selective Service Act (R 1714).

Furthermore, Deputy Assistant Attorney General Lawrence Sims, in his appearance before the House Subcommittee on Military Personnel on March 5, 1980, described the congressional attitude in 1948 in the following terms:

> ...to summarize, that legislative history, it is replete with the kind of sexual stereotypes and that kind of thinking that the court has subsequently held will not support the constitutionality of a legislative act of Congress. (12 1044 Jur. St. 232, n.15).

In the District Court, the stereotypes cited included statements that men would not take orders from female officers and women would get married before they qualified for pensions. (Jur. St., 23a n.15).

The appellant's principal source of facts relied upon to support male-only

registration is S. Rep. 96-826 April 22, 1980, the report of the five-man majority of the Senate Subcommittee on Manpower and Personnel (R874-886). Appellant argues that the registration of women would lead to reduced military flexibility and a myriad of administrative problems since, in the case of conscription, the military would be in need of individuals to fill combat positions and there are enough female volunteers to fill non-combat positions.

It should be pointed out that this rationale was developed post hoc and in fact was specifically developed for use in this case. This makeshift rationalization should not be considered by the Court in determining whether the MSSA passes constitutional muster. Craig v. Boren, 429 U.S. at 199 n.7. Under the heightened scrutiny requird, only evidence of actual legislative intent at the time that the legislation is passed may be invoked to defend discriminatory legislation.[5]

A thorough examination of the legislative history set forth in the record clearly discloses that Congress never actually addressed and considered the purported decreased flexibility that the appellant contends would ensue from the registration of females. Undeniably, nothing in the history of this legislation provides the government with a rationale for male-only registration

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[5]Califano v. Westcott, 443 U.S. at 86-88; Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975).

which can withstand constitutional scrutiny.

1. MALE-ONLY REGISTRATION DOES NOT ENHANCE MILITARY FLEXIBILITY AND IS MYOPIC IN ITS FAILURE TO CONSIDER THE CONTRIBUTION OF WOMEN TO TODAY'S MILITARY

Assuming "arguendo" that this Court will consider the post hoc rationale of military flexibility in determining whether male-only registration is substantially related to an important government purpose, the Amicus submits that this rationale is specious and fails to consider the important roles females are assuming in today's military.

In 1980 President Carter, as Commander-in-Chief, did not feel that female registration would decrease the flexibility of the military in meeting exigencies at home and around the world. In his presidential recommendation pursuant to P.L. 96-107 (February 11, 1980) (R 196) he decided to "seek authority to register, classify, and examine women for service in the armed forces..." The President concluded in his recommendation:

> Equity can be achieved by registering both men and women and then providing that they serve in proportion to the ability of the armed forces to use them effectively. Conscription would be based upon actual military personnel needs at the time. (R 201).

The Director of Selective Service, appellant in this case, urged the various subcommittees to support the registration of women:

> I think it behooves us to have as large a base as possible commensurate with the jobs that the Defense Department requires to be done and the skills and abilities of the people who are available to do those jobs. (R 1049)

In addition to the position of President Carter, and the Director of Selective Service, the Assistant Secretary of Defense concurred with his Commander-in-Chief in stating:

> The performance of women in our armed forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women ... [those women] should be available for service in the jobs. (R 1033)

Thus the newly found argument of the appellant that female registration will detract from military flexibility has been refuted by those in the best position to assess the impact with respect to flexibility that female registration would have. The District Court found that it was incongruous that Congress believes on the one hand that it substantially enhances our military defense to expand the utilization of women in the military while on the other hand endorses legislation excluding women from the pool of registrants.

As the court below noted, women have been admitted into the armed services in greater numbers. From 1967 to 1977 women in the armed services increased from .78% to over 5%. In Vietnam more than 7000 women served in support roles which qualified for combat pay. In the Air Force, 35% of the women (some 20,000) serve in non-traditional jobs, many of these directly related to the care and maintenance of fighter aircraft and missile operations.[6]

In light of women's increasing role in the military and the support that female registration has received from President Carter, the Director of Selective Service, the Undersecretary of Defense, as well as the Joint Chiefs of Staff, it is perfectly understandable and correct that the Court should reject the proffered, after-the-fact, military flexibility argument of the appellant. The record is replete with instances where registration of women would only enhance military flexibility. The appellees and the Amicus recognize the ineluctable fact that a greater resource pool maximizes flexibility rather than detracts from it.

Furthermore, the focus of this appeal is upon the exclusion of females from the responsibilities and potential penalties of draft registration. The Amicus recognizes full well that conscription and the utilization of personnel within the military sphere is within the province of

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[6]Department of Defense Background Study -- Use of Women In The Military at p. 5 (2d ed. 1978).

congressional war power. Male-only draft registration, rather than increasing military preparedness, ignores a vital, creative, and flexible resource which has clearly demonstrated its beneficial impact upon the military.

No better authority exists than General Dwight D. Eisenhower to reinforce the position of the appellees and Amicus. In 1948, he testified as follows:

> Like most old soldiers I was violently against women soldiers. I thought a tremendous number of difficulties would occur, not only of an administrative nature ... but others of a more personal type that would get us into trouble. None of that occurred ... in the disciplinary field they were a model for the Army. More than this their influence throughout the entire command was good -- I am convinced that in another war they have got to be drafted just like men.[7]

2. MALE-ONLY REGISTRATION IS BASED ON ARCHAIC AND OVERBROAD GENERALIZATIONS ABOUT MALES AND FEMALES.

The military selective service system is the single most visible example of

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[7]Hearings on S1614 before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services (80th Cong., 2d Sess. No. 238 at 5563-64 (1948) (Emphasis Added).

sex-role stereotyping in our society. It is implicit in male-only registration that men are, because of their innate qualities, better suited to war than women. Thus, male-only registration perpetuates the idea that men are the reckless, aggressive, violent, and insensitive members of our society. Conversely, the idea that men can be gentle, loving fathers, as fit as women for child rearing is discredited.

In U.S. v. St. Clair, 291 F.Supp. 122 (S.D.N.Y., 1968), the Court found Congress' justification for male-only compulsory military service as follows:

> In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive men must provide the first line of defense while women keep the home fires burning. (291 F.Supp. at 126.)

This Court has soundly rejected statutory schemes based upon such overbroad generalizations. Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Stanley v. Illinois, 405 U.S. 645 (1972).

In Weisenfeld this Court said the following:

> The fact that a man is working while there is a wife at home does not mean that he would, or should, be required to continue to work if his wife dies. It is no less important for a child to be cared for by

> its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of the children he has sired and raised (citation omitted). (420 U.S. at 652.)

Sex role stereotyping is totally reinforced by male-only registration. Being the only ones eligible for compulsory military service, men are cast as expendable while women are cast as caretakers of the home and hearth. Women are to be protected from the ugliness of war, whereas men can be so subjected.

It has been the history of the debate on the discriminatory aspect of male-only registration that the armed services have endorsed registration of women and have supported their position with ample evidence that women have been and will continue to be useful in all branches of the armed services. Male-only registration is thus based upon certain outmoded perceptions by a handful of congressmen. These perceptions cannot withstand constitutional challenge.

In addition to the perpetuation of stereotypes, male-only draft registration runs counter to the will of the American public. Recent poll analyses clearly demonstrate that the majority of men and women surveyed prefer male-female registration to male-only registration. In a Gallup poll taken on March 2, 1980, 59% of the men and 52% of the women surveyed

favored a male-female registration, whereas 25% of males and 29% of the females were in favor of a male-only registration.[8] Subsequently on July 20, 1980 the Gallup surveys of adult males and females revealed that 53% of the men and 49% of the women favored the registration of both males and females, while 23% of the men and 25% of the women favored male-only registration. (Id.)

These surveys demonstrate that the body politic of this country has recognized that the burden and potential liabilty entailed in compulsory draft registration should be borne equally by males and females in the 18-26 age bracket. The Amicus submits that the recent history of this country has shown that the American public's perception of what is beneficial to the country is not always reflected in congressional attitudes.

The Amicus submits that the after-the-fact conclusion by a handful of congressmen, that female registration will result in decreased flexibility in military preparedness, is neither supported by those in the best position to know nor the public at large. This flexibility rationale is merely a subterfuge for the perpetuation of paternalistic and sexual conceptualizations that the American people currently feel are not substantially related to an important governmental objective.

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[8]See Analysis Shows Most Americans Oppose Men Only Draft Registration and a Men Only Draft, Ledden (1981) p. 4.

3. THE RECORD, AS WELL AS THE OVERWHELMING WEIGHT OF STARE DECISIS, SUPPORTS THE DECISION OF THE LOWER COURT.

The District Court found that, rather than enhancing military flexibility, it

> ...is the antithesis of flexibility to exclude women from the pool of registrants that could be called upon in a time of national need. (Jur. St., 432)

As the result of this finding, which was amply supported throughout the record, the District Court held that,

> ...the complete exclusion of women from the pool of registrants does not serve "important governmental objectives and is not substantially related", (Craig v. Boren supra at 197) to any alleged governmental interest. (Jur. St. 43A)

The Amicus submits that the findings and rulings of the District Court are totally supported by the overwhelming weight of the evidence as well as the legal precedent involved. No other decision could have been rendered. It was legally correct and is, in addition, consistent with the wishes of the body politic.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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February 5, 1981

Fredric Hayward, Director
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Re: Goldberg v. Rostker

Dear Mr. Hayward:

Thank you for your letter of January 29, 1981. I am pleased to confirm that appellees consent to the filing of an amicus brief by the organizations which you represent.

Very truly yours,

Donald L. Weinberg

DLW:mfp

United States Department of Justice
Office of the Solicitor General
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January 19, 1981

Fredric Hayward, Esquire
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Re: No. 80-251, Goldberg v. Rostker, et al.

Dear Mr. Hayward:

You have requested our consent to the filing of an amicus curiae brief in this case on behalf of the Men's Rights, Inc. I am happy to consent to that filing.

Sincerely,

Wade H. McCree, Jr.
Solicitor General

cc:
Alexander L. Stevas, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

No. 80-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR AMICUS CURIAE NATIONAL ORGANIZATION FOR WOMEN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR AMICUS CURIAE NATIONAL ORGANIZATION FOR WOMEN

INTEREST OF AMICUS

The National Organization for Women (NOW) is a nonprofit corporation founded in 1966 and dedicated to the achievement of equality for women in American society. NOW is the largest feminist organization in the world, with more than 125,000 members and chapters in every state in the nation. NOW's main purpose is ". . . to take direct action to bring women into the full participation of society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men." Bylaws, Article III.

NOW has participated as amicus curiae in a number of cases before this Court involving challenges to laws and governmental policies that discriminate on the basis of sex. NOW has also engaged in legislative action and litigation in an effort to secure equal rights for women.

NOW believes that this case poses an issue of critical importance to the achievement of full equality between the sexes. The requirement to register and be classified for eligibility for induction into the armed forces is a responsibility which NOW believes, if imposed at all, must be imposed equitably on all members of society who are capable of serving, irrespective of gender.

SUMMARY OF ARGUMENT

This case involves the constitutionality of those provisions of the Military Selective Service Act (MSSA), 50 U.S.C. App. § 451 *et seq.*, which require all male citizens and residents of the United States between the ages of eighteen and twenty-six to register for eligibility for induction into the Armed Forces. 50 U.S.C. App. §§ 453, 454(a). The goal of the MSSA is to register a pool of individuals who can be inducted into military service in the event of a national emergency. The MSSA neither requires nor permits any women to register and be classified.

This case does not involve the questions of eligibility for induction, assignment of personnel after induction, or assignment of women to combat roles, however those are defined. The sole issue presented is whether the exclusion of all women from the right to register and be eligible for induction violates the fifth amendment to the United States Constitution.

The line drawn by the MSSA is a rigid gender line which no woman can cross. It is blatant and harmful discrimination on the basis of sex, and in order to survive constitutional challenge, it must bear a substantial relationship to an important governmental purpose. It utterly fails that test. Indeed, it cannot even pass the rational relationship test which the government asserts is applicable. By excluding women from eligibility, the Act substantially reduces the quality of the pool from which the members of the armed forces are drawn.

The government's contention that the statute is a neutral classification based on "combat eligibility" is an attempt to shift attention from the issue at bar to a hypothetical question not raised in this case. In any event, the elusive definition of "combat" and the overwhelming evidence that women can perform "combat" roles demonstrate that the notion of "combat eligibility" cannot justify the exclusion of women from registration.

The exclusion of women from registration has a profound and harmful impact on women and society as a whole. The exclusion reinforces the sex-role stereotypes harmful to women that have proven so resistant to change. By giving a governmental imprimatur to these stereotypes, the MSSA sanctions a continuing false view of women as weak and unfit to serve their country. This stereotype of women as incapable of defending their country or themselves causes harm to women by increasing the prospect of violence in their daily lives. The military, a powerful and central social institution, should not be permitted to continue to support sex-role stereotyping that locks women into the status quo.

The MSSA also harms women by excluding them from the compulsory involvement in the community's survival that is perceived as entitling people to lead it and derive from it the full rights and privileges of citizenship. Permitting women to serve as volunteers is not the equivalent of registering them and does not alleviate the constitutional infirmity of a male-only registration.

In sum, the exclusion of women from registration disserves the goal of an effective military and powerfully reinforces harmful stereotyped beliefs about women and their role in our society. The cycle of old expectations and behaviors cannot be broken as long as the government, through the exclusion of women from registration, continues to lend unwarranted credence to the stereotypes that fuel that cycle. The decision of the district court declaring the challenged provisions of the Selective Service Act unconstitutional should be affirmed by this Court.

ARGUMENT

I. The Exclusion of Women from Registration Is A Denial Of Equal Protection of The Laws.

The goal of the MSSA is to register a pool of individuals who, in the event of a national emergency, can be inducted promptly into the armed forces. By requiring all males and no females to register for possible induction into the armed forces, the MSSA tells all women, that solely because of their gender, they will not be called upon to serve and defend their country, that they will not be relied upon in time of greatest national need. It thus announces to women (and their male compatriots) that women constitute a different—and inevitably lesser—class from all men merely on the basis of gender. The exclusion of women from the requirements of the MSSA is sex discrimination, pure and simple.

A. *The Exclusion of Women From Registration Bears Neither A Substantial Relationship To An Important Governmental Objecitve Nor a Rational Relationship to a Proper Governmental Purpose.*

The decisions of this Court from *Reed* v. *Reed*, 404 U.S. 71 (1971) to *Wengler* v. *Druggists Mutual Inc. Co.*, 446 U.S. 142 (1980) make unequivocally clear that laws drawing gender lines must bear a substantial relationship to an important governmental objective. Gender-based classifications require heightened scrutiny because of our nation's "long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) and because they "have frequently been revealed on analysis to rest only upon 'old notions' and 'archaic and overbroad' generalizations. . . ." *Califano* v. *Goldfarb*, 430 U.S. 199, 208 (1977). Examining the MSSA against this standard compels the conclusion that the exclusion of all women from registration does not bear a substantial relationship to the governmental interest in military readiness and flexibility. Indeed, because Congress has

undermined rather than promoted that goal by arbitrarily eliminating all women from the pool of potential inductees, the Act does not even bear a rational relationship to a proper governmental purpose.[1]

First, from the standpoint of sheer numbers, the goal of the MSSA is badly served by excluding all women. Between 1980 and 1992 the population of young males will decrease by almost 25 percent. M. Binkin & S. Bach, *Women and the Military* 66 (1977). The decreasing male population has in fact been one of the pragmatic reasons for the increased utilization of women in the armed services in the past decade. Office of the Secretary of Defense, *Use of Women in the Military* (2d ed. 1978) (Joint Appendix [J.A.] at 111).

Second, utilization of women ensures a higher quality pool of registrants. Common sense dictates that selection from a pool including men and women will yield a better quality force than will the arbitrary elimination of one-half the potential pool. Women today are an important factor in our nation's workforce and an essential part of the technically trained and trainable pool of young people needed to operate the modern military. In light of the increasingly technological nature of the current military, the female percentage in the pool of people with the required skills is steadily increasing. [2] Indeed, women

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[1] For a fuller discussion of the necessity for applying a heightened level of scrutiny in this case, amicus respectfully refers the Court to the brief submitted by the Women's Legal Defense Fund and the Women's Equity Action League Fund, Inc.

[2] *See, e.g.*, M. Janowitz, *Military Conflict* 61, 65, 110-135 (Sage-mark ed. 1978); M. Janowitz, *The Professional Soldier* 32 (1971); Enloe, *Women: the Reserve Army of Army Labor*, 12 Rev. of Pol. Economies 42 (1980); Goldman, *The Changing Role of Women in the Armed Forces*, 78 Am. J. of Soc. 892 (1973); Goodman, *Women, War and Equality: An Examination of Sex Discrimination in the Military*, 5 Women's Rights L. Rep. 243 (1979); M. Segal, Women in Combat: Contributions to the War of Words 3 (paper prepared for the Inter-University Seminar on Armed Forces & Society,

are a vital part of the administrative, computer, communications, medical and other technical personnel of this nation, all of whom are essential to the military.[3]

In the modern military, education is the best measure of the potential of a recruit or inductee. According to the Department of Defense, possession of a high school degree is the factor most closely correlated to success in the armed forces. *America's Volunteers, supra* note 3, at 30. More women than men complete high school. *Id.* at 31. Similarly, the ranks of military officers have traditionally been drawn from the college population, which is now more than 50 percent women. *U.S. Bureau of the Census, No. 355, School Enrollment—School and Economic Characteristics of Students* 20 (Oct. 1979). Women recruits average ten points higher than men on military entrance tests. *Use of Women in the Military, supra* at 22-23.

Third, many performance indicators confirm the high quality of women as soldiers. Women are being promoted at the same or higher rates than men in all military occupations open to women. *America's Volunteers, supra* note 3, at 74. Women recruits are less likely to have discipline problems and they lose less time than men for absence without leave, desertion, alcoholism and drug

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Oct. 25, 1980); Hoiberg, Military Occupations: The Cutting Edge for Women? (Rep. No. 80-27) (undated, available from Naval Health Research Center, San Diego, Cal.).

[3] *See U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2080, Perspectives on Working Women: A Data-book,* 10-11 (Table 11) (1980); *see also* U.S. Dept. of Labor, Women's Bureau, *The Employment of Women: General Diagnosis of Developments and Issues* (April 1980); Office of the Secretary of Defense, *America's Volunteers: A Report on the All-Volunteer Armed Forces* ch. 3 (1978) (J.A. at 81); *Presidential Recommendations for Selective Service Reform: A Report to the Congress Pursuant* to P.L. 96-107 (Feb. 11, 1980) (J.A. at 59); *Use of Women in the Military, supra* (J.A. at 107, 116).

abuse. *Binkin & Bach, supra* at 62 (J.A. at 142); Hoiberg & Thomas, The Economics of Sex Integration: An Update of Binkin & Bach 10 (paper presented at the twentieth anniversary conference of the Inter-University Seminar on Armed Forces & Society, Oct. 25, 1980). These data demonstrate that the inclusion of women would significantly enhance the quality of the pool of registrants.

Despite this overwhelming evidence that the exclusion of women disserves military readiness, some have argued that women should not be registered for other reasons. None of these concerns justifies a blanket exclusion of women from registration.

First, some nonparties to this lawsuit argue that because American men are on the average taller, heavier, and stronger than American women, it follows that women are somehow unfit to serve. This conclusion makes no sense. The fact that the average man is stronger than the average woman does not mean that all men are stronger than all women. Differences in strength and physical conditioning narrow and disappear when women receive adequate training, and it is a simple fact that some women are stronger than some men.[4] Moreover, size and strength are not always synonymous. A person trained in the martial arts can defeat a larger opponent. Technological advances also continue to diminish the importance of brute strength. A soldier with a smaller physique can perform certain tasks in today's planes, ships,

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[4] Studies of women in athletics provide ample evidence of these facts. A. Ryan & F. Allman, Jr., *Sports Medicine* ch. 10 (1974). *See* Wood, *Sex Differences In Sports*, N.Y. Times Magazine, (May 18, 1980); *The Weaker Sex? Hah!*, Sports Illustrated, (June 26, 1978). *See also* Harris, *Physiological Differences Between the Sexes: Exploring Old Myths* (paper presented at Sports Medicine Symposium, Hahnemann Medical School, Sept. 10-14, 1978); Wilmore, *Inferiority of Female Athletes: Myth or Reality*, 3 J. of Sports Med. 1 (1975). Copies of these articles and studies may be obtained from the Women's Equity Action League Fund, Inc. ("Project Sprint") (Washington, D.C.).

and tanks more proficiently than a larger person. *Use of Women in the Military, supra* (J.A. at 140-141). In fact, many of the jobs in the military, particularly in the Air Force and Navy, do not require the brute strength associated with military service. Finally, those women, like those men, who can not meet the physical requirements would not be called to serve. Yet the undisputed evidence that many women can perform successfully means that the MSSA now excludes a substantial portion of the qualified pool.[5]

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[5] *See e.g.*, Binkin & Bach, *supra*; N. Kinzer, *Stress and the American Woman*, ch. 2 (Ballantine ed. 1978); Adams, *Women in the Army*, 54 New Soc'y 365 (1980); Kirstein, *Female Soldiers' Social Adjustment*, 143 Mil. Med. 693 (1978); *America's Volunteers, supra* note 3 (J.A. at 80); M. Segal, Women in Combat, *supra* note 2. *See also*, Gorman, The Marines are Looking for a Few Good Women (1977) (unpublished manuscript available from the U.S. Marine Corps.); Martin, Habitability Aspects of Women Aboard Ship, 87-90 (5th Symposium on Psychology in the Air Force, U.S. Air Force Academy, April, 1976); Schreiber & Woelfel, Women in Men's Boots: Performance and Adjustment of Women in the Coed American Army of the 1970's (paper delivered at 1977 annual meeting of the American Sociological Ass'n); "Fort Jackson's WACs are Very at Home on the Range," 26 Army 26 (1976); Masson, Elements of Organizational Discrimination: The Air Force Response to Women as Military Pilots (1977) (unpublished thesis available from Univ. of Southern Cal.); Evaluation of Women Aboard the U.S.S. *Sanctuary* [AH-17] (Memorandum from the Commanding Officer, U.S.S. *Sanctuary* to Chief of Naval Personnel, dated Nov. 19, 1973) (J.A. at 166).

See also Hearings on National Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services, 11-15, 20-25, 28-35, 96th Cong., 2d Sess. (1980) (J.A. at 215-218, 222-225, 227-230); *Military Draft Registration: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. (1980); S. Rep. No. 96-226, 96th Cong., 2d Sess. (1980); *Presidential Recommendations, supra* note 3.

Women are clearly qualified for military service. Every woman entering the military as a volunteer today, whatever her eventual assignment, must complete the same basic training as a male en-

Others argue that all women should be excluded from registration because it is repugnant to a civilized society to expose women with family responsibilities or childbearing potential to the brutality of war. This argument ignores the fact that there already are exemptions from military service based on family responsibilities. *See, e.g.*, 50 U.S.C. App. §§ 456(h), 456(o). Applying these exemptions on the basis of individual attributes and actual characteristics, rather than on gender, is a sex-neutral method of carrying out legitimate policies relating to families without resorting to the grossly overbroad exclusion of *all* women. *Taylor* v. *Louisiana*, 419 U.S. 522, 534-35 & n.17 (1975). Additionally, some women are not capable of bearing children, nor do others wish to do so. Even for those who do plan to have children, service may simply mean deferral of these plans, as it does for men, or taking pregnancy leave.[6]

Others have argued that women's sensitive nature makes them unable to contend with the violence and brutality of war. Yet women have responded with bravery and steadfastness when they have been required or permitted to fight for their country. These characteristics are individual ones, called forth when needed, and are present in varying degrees in members of both sexes.[7]

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listee. *America's Volunteers*, *supra* note 3 (J.A. at 92); Woelfel, *Women in the Army* (paper presented at Southwest Conference on Armed Forces and Society, 1978).

[6] Even including the time taken for pregnancy leave, the Department of Defense data regarding total lost time by women and men do not reveal significant differences. *Use of Women in the Military*, *supra* at App. F-32 & 33; Hoiberg & Thomas, *supra* at 8-10.

[7] Likewise, the contention that all women should be excluded because some women hold religious convictions which preclude them from serving is absurd. Both men and women can apply for conscientious objector status based on individual beliefs. *See* 50 U.S.C. App. § 456(j).

Other fears expressed by opponents of registering women bear a striking resemblance to the apprehensions that preceded racial integration in the military—that integration would lead to lessened effectiveness, debilitation of unit morale, racial tension, and restricted unit deployability because black soldiers were alleged to be untrustworthy, unreliable, cowardly, argumentative, and less effective fighters than white soldiers. Yet the Army's own research on the effects of desegregation showed the opposite. Integrated units had less internal friction and exhibited higher morale than did segregated units; they were also more highly organized and ran more smoothly. Integration in fact led to decreased racial prejudice and revision of stereotyped thinking among the white soldiers in the integrated units. L. Bogart, *Social Research and the Desegregation of the U.S. Army* 102, 140, 219 (1969). It also removed stereotypical attitudes of blacks and whites about the relative hardship of their military roles; men in all-black units had previously felt that military hardship was motivated by discrimination while all-white units resented the fact that black units were deployed in lower-risk support capacities. *Id.* at 182.

Indeed, the judgment of the military's own experts is wholly at odds with the fears voiced about registering women and the Congressional decision to exclude them. As the district court observed:

> The army has been significantly expanding the positions open to women. U.S. Army, Evaluation of Women in the Army (1978), Record at 634; Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 75 (1978). "These changes in Army policy are not whims, but are based on extensive study." Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 76 (1978). In the mid 1970's, Congress opened the military service academies to women. E.g. 14 U.S.C. § 182(a). Congress repealed the statutes

> excluding women from combat in the army when it abolished the Women's Army Corps as a separate entity within the regular Army. 96 Stat. 1627, repealing, 10 U.S.C. § 3071. If we were to accept defendants' argument that the exclusion of women is necessary for an effective armed service, the inevitable sequitur of these increased numbers is that the military is intentionally and progressively weakening our armed forces.

(Jur. St. at 38a n. 28).[8]

The district court correctly concluded that the exclusion of women from registration is counterproductive to the goal of military flexibility and readiness. Under any level of scrutiny, and certainly under the heightened standard which is required, those provisions of the MSSA at issue in this case cannot survive.

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[8] As the district court also noted:

> It is difficult for us to accept the inconsistent positions of Congress. Congress has continuously allocated funds for the increase of the number of women in the armed services, in both absolute terms and as a percentage of total forces. There can be no doubt that the experience of women in the all volunteer army has been a success story . . . It is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants available for induction. . . .
>
> The President, the Director of the Selective Service System, and representatives of the Department of Defense informed Congress that including women in the pool eligible for induction would increase military flexibility. The record reveals that in almost any conceivable military crisis the armed forces could utilize skills now almost entirely concentrated in the female population of the nation. Jur. St. at 37a-41a (footnotes omitted).

Moreover, a majority of the population concurs with the judgment of the military that women should be registered. In a Harris poll taken in March, 1980, 55% of the population surveyed favored registering women; in a Gallup poll taken in February of that year, 56% thought that registration should be required of both sexes.

B. *Appellant's Attempt to Disguise the Sex-Based Classification as a Fair and Neutral Classification Deserves Short Shrift.*

The government, recognizing that it cannot prevail on the issue of total exclusion of women from registration, has now attempted to distract the Court's attention with a novel but unfounded argument. In its brief in this Court, the government argues for the first time that the Selective Service Act does not draw a line between men and women but between those who are "combat-eligible" and those who are not. Appellant now contends that the statute is not based on gender *per se*, but on a sex-neutral "combat" classification.[9] Appellant urges that this "combat" prohibition makes the registration of women useless since their registration would restrict the flexibility of the military services by forcing them to conscript persons who could not serve in combat. This argument is a transparent attempt to hide from the issue at bar. Even if combat eligibility were an issue in this case, however, the government's argument is without legal or factual support.

First, the cases cited by the government in support of its "neutral" classification do not support its position. The disability insurance plan challenged in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) excluded only one condition from the plan, pregnancy (a condition affecting some, but not all women), but covered virtually all other medical conditions suffered by men and women. The statute did *not* distinguish between all men and all women, as the MSSA does. In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), this Court upheld a different rule on length of service for male and female naval officers because the

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[9] Applying this argument, the government would presumably argue that a statute which made only whites (or blacks) combat-eligible and then required only combat-eligible people to register would not be race discrimination.

two groups were not similarly situated and the rule, intended to offset the lesser opportunities available to women, did not reinforce stereotypical views about women's inferiority. In the instant case, many women are qualified for military service—that is, are similarly situated to the men who must register—and the exclusion from registration reinforces the stereotype that women are unfit, solely because of their sex, to serve their country.[10]

Second, the contention that "combat eligibility" is a meaningful standard as a practical matter is nothing more than sophistry. The government's argument that the MSSA is rationally related to a proper governmental function cannot be based on a policy which is itself irrational. No uniform criteria distinguish "combat" positions from other military jobs, as the government would have this Court believe.[11] The Department of Defense

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[10] Nor is this case analogous to *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), in which a facially neutral veterans' preference statute was challenged under the fourteenth amendment because of its disparate impact on women. In *Feeney*, this Court found that the statute was not intended to distinguish between all men and all women, as women were able to become members of the class which benefitted from the law. In the case at bar, on the other hand, women can do nothing to bring themselves within the scope of the statute.

The other arguments made by the government about the appropriate standard of review are equally unpersuasive. For example, the fact that Congress may, in time, amend the statute is irrelevant. The same could be said of virtually every law this Court has reviewed. Nor is a "rational relationship" standard of review appropriate on the ground that appellees are asking this Court to interfere with the internal personnel decisions of the military services, as did plaintiffs in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Appellees are merely asking this Court to decide whether the total exclusion of women from registration is constitutional.

[11] Confusion over the meaning of "combat" has been so acute that on several occasions Congress has requested the military to define the word. *See* 126 Cong. Rec. S6320 (daily ed. June 5, 1980) *citing* Pub. L. 95-75.

itself admits that the umbrella of "combat" covers a wide range of jobs:

> Leading a bayonet charge is different from launching an ICBM from the United States or operating a fire control system for artillery behind the lines. There is a difference between the first wave of an amphibious invasion and controlling aircraft from an aircraft carrier or typing correspondence on a fleet oiler . . . .

Use of Women in the Military, supra (J.A. at 143). Thus, combat depends neither on the nature of the skills required nor on considerations of location and risk.[12]

Moreover, women are serving and have throughout our history served successfully in many "combat" roles. As this Court has recognized:

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[12] *See Hearings Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm., Authorization for Fiscal Year 1979*, 95th Cong., 2d Sess. 2129 (1978) (testimony of Assistant Secretary of the Army Robert Nelson).

When the needs of the military are served, the significance of the designation "combat" can be shifted. Thus, 10 U.S.C. § 8549 excludes women from serving on Air Force craft "engaged in combat missions," but 10 U.S.C. § 8067 permits female medical, dental, veterinary or nursing specialists, chaplains and judge advocates to be included on "combat" missions. Female nurses and other medical personnel are defined as "noncombatants" even when they are in battle zones. *See Hearings on Military Posture on H.R. 10929 and H.R. 7431 Before the House Comm. on Armed Services*, 95th Cong., 2d Sess. [*1978 Defense Appropriations Hearings*] 1190-1192 (1978) (J.A. at 174).

As Senator Goldwater recently observed:

> These women served as nurses, they served in ambulances. They were in combat, although technically they were not . . . . There is nothing in the orders any man ever has received in the military stating specifically, 'You are going to combat.' It just says where you are going and after you have been there a while, you figure out whether you are in combat or not.

126 Cong. Rec. S6540 (daily ed. June 10, 1980).

> Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin and S. Bach, Women and the Military 5 (1977).

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256, 268, n.18 (1979). Indeed, recent evidence suggests women had a larger role than was previously acknowledged during wars of the 18th, 19th and 20th centuries.[13] In World War II and the Vietnam War, hundreds of thousands of women served in "combat" roles in battle zones. Nor have women been spared the risk of capture. The female hostages in Iran, the women soldiers in Vietnam, and the Army and Navy nurses held prisoners of war in the Philippines during World War II were all exposed to such dangers. *1978 Defense Appropriations Hearings*, *supra* note 12, at 1203.

Finally, as noted above, the evidence is overwhelming—indeed, undisputed—that women are capable of filling current positions that bear "combat" labels. The studies performed by the Army during its annual combat simulation exercises tested units with up to 35 percent women; these units did as well as or better than all-male units in field exercises. U.S. Army Research Institute for the Beha-

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[13] During the American Revolution, tens of thousands of women in the Women of the Army Force were involved in combat as regular uniformed troops. DePauw, Women in Combat: The Revolutionary War Experience (to be published in Armed Forces and Society, 1981); Goodman, *supra* note 2, at 260-61. Many women were also "irregular" fighters affiliated with local militia. A recently discovered list, dating from the Revolutionary War, of all persons in a particular district who were capable of bearing arms, is one-fifth women. DePauw, *supra* at 19-20. The War of 1812 and the Civil War also drew many women into combat. Binkin & Bach, *supra*. Public recognition has finally been given to the members of the Women's Air Corps Service Pilots who flew military aircraft in World War II. *See* The Washington Post, p. 1, col. 3 (March 6, 1977); S. Kiel, *Those Wonderful Women in Their Flying Machines: The Unknown Heroines of World War II* 5-6 (1979).

vioral and Social Sciences, *Women Content in Unit Forces Development Test* (MAXWAC) (1977); *Women Content in the Army-Reforger 1977* (REFWAC) (1978).[14] The

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[14] *See* Savell & Johnson, Predicting Company Performance from Percent Female in Support-Type Army Units: A Second Report from the "MAXWAC" Study (paper delivered at 1980 American Psychological Ass'n annual meeting). *See also Binkin & Bach, supra,* at ch. 7; U.S. Army Human Engineering Laboratory, Technical Note 11-78 at 3-4, 11 (R 1697-98, 1705) (J.A. 96) (women loading 105 mm and 155 mm howitzers not only met the Army standards, but in several instances, exceeded it). Air Force studies indicate that nearly all women can meet the criteria for about 84% of the jobs. Hoiberg, *supra* note 2, at 8-13 & studies cited therein. The high level of performance of women cadets at the academies and the cohesion in the groups to which they belong corroborate these studies. DeFleur & Gillman, *Sex Integration of the U.S. Air Force Academy: Changing Roles for Women,* 4 Armed Forces & Soc'y 615 (1978); Durning, *Women at the Naval Academy: An Attitude Study of Armed Forces & Society,* 4 Armed Forces & Soc'y 569 (1978); Safilios-Rothschild, Women in a Male Domain: Coast Guard Men's and Women's Attitudes and Reactions (paper delivered at National Conference of the Inter-University Seminar on Armed Forces and Society). *See also* Galloway, *The Impact of the Admission of Women in the Service Academies on the Role of the Women Line Officers,* 19 Am. Behavioral Sci. 667 (1976); Safilios-Rothschild, *Men and Women Aboard a Training Cruise of the U.S. Coast Guard Barque 'Eagle,'* 10 Youth & Soc. 205 (1978). Women cadets have performed extremely well as group leaders as well. *See* Adams & Hicks, *Leader Sex, Leader Descriptions of Own Behavior, Subordinates Description of Leader Behavior (Project Athena, West Point),* 3 Int'l J. of Women's Studies 321 (1979).

Studies testing women police officers' ability to command respect, use authority, respond with force when necessary and face physical and often armed resistance are also persuasive evidence that women possess the skills required for combat. The central finding of these studies is that women police and highway patrol officers "were equally effective as males in all observed facets of police work." National Information and Research Center on Women in Policing, Performance Evaluations Information Packet 2 (June 1980); Bartlett & Rosenblum, Policewoman Effectiveness (Denver Civil Service and Denver Police Dept., 1977). Another study found no correlation between height and weight and successful perform-

Army now routinely assigns women to combat support and combat service support positions. Their performance in those positions is the best evidence of their ability to do the required tasks.[15]

Indeed, in 1979 the Defense Department asked Congress to repeal the remaining statutory restrictions on assignment of women to "combat" roles on the ground that large numbers of women "properly trained and selected, have the physical and mental ability to serve in the *entire range* of military classifications." 126 Cong. Rec. S6320 (daily ed. June 5, 1980) (emphasis added).

In sum, the government would have this Court believe in a never-never land, where combat and non-combat are neatly divided and where the rich variety of reality is sacrificed to the convenience of allowing gender to determine fate. This argument is factually and legally unsound and cannot justify the exclusion of all women as registrants for military positions.

II. The Exclusion of Women From the MSSA Reinforces Deeply-Held Stereotypes that Injure Women and Society as a Whole.

The most obvious effect on our society of the exclusion of women from the requirements of the MSSA is that a male-only draft dramatically narrows the pool of eligibles for military service and excludes many who would otherwise qualify. However, there is another, more invidious harm caused by the male-only draft: the governmentally sanctioned perpetuation of sex-role stereotypes and the endorsement of behavior consistent with them.

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ance. Kizziah & Morris, Evaluation of Women in Policing Program, Newton, Mass. (1977); *see also* Sherman, *A Psychological View of Women in Policing*, 4 J. of Police Sci. & Ad. 383 (1973).

[15] The government's argument about "combat-eligibility" is particularly ironic in light of the fact that the Army, the service into which most draftees are inducted, already assigns women to a wide range of combat positions.

The opinions of this Court over the last ten years express a growing concern about the systemic and persistent nature of "the baggage of sex-role stereotypes." *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). As this Court has recognized:

> Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination. . . . [G]ender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes. Sex based classifications are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that an individual cannot change. Such laws cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class. A gender-based classification need not ring false to work a discrimination that in the individual case might be invidious.

Caban v. *Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (citations omitted).

Stereotypes are reinforced by psychological processes that distort reality and then create expectations that influence behavior to fit the distortion. Thus, people with stereotyped views assume that the stereotyped group is homogeneous and clearly distinct from their own group. The impact of a stereotype is all the greater when it carries the sanction of the law.[16]

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[16] Bem & Bem, *Case Study of a Nonconscious Ideology: Training Woman to Know Her Place*, in D. Bem *Beliefs, Attitudes, and Human Affairs* (1970). The literature on the harmful effects of sex stereotyping is voluminous. *See, e.g.*, Merton, *The Self-fulfilling*

This Court has invalidated laws which are far less blatant than the MSSA in reinforcing negative stereotypes about women, involving institutions far less conspicuous and important to our nation than the military. For example, the statute invalidated in *Stanton* v. *Stanton*, 421 U.S. 7 (1975), requiring parental support of a son until age 21 but of a daughter only to age 18, created a self-fulfilling prophecy that a woman is destined to marry and be supported by her husband at a young age. By denying women the opportunity to obtain the education needed for many jobs, the statute made the stereotyped expectation more likely to occur.

Similarly, other laws constrain women by making it economically beneficial to distribute roles along sex lines. For example, the statute challenged in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), which denied housing benefits to most husbands of female soldiers while giving them to all wives of servicemen, became an economic incentive for married men, rather than women, to enlist.

Laws such as the MSSA that coerce or preclude women as a class from performing tasks or jobs of which they are capable impermissibly limit the right of individuals to shape their own destiny. *See, e.g., Reed* v. *Reed*, 404 U.S. 71; *Frontiero* v. *Richardson*, 411 U.S. 677. When a group has historically occupied an inferior status, permitting the government to use group identity to define individual aspirations will inevitably place a ceiling on opportunity. This Court has recognized that it makes little difference if the stereotype is ostensibly benign and the rationale for the law a protective one, as has been suggested about the MSSA. *Frontiero*, 411 U.S. at 684-85. It still limits the protected group and, on examination, proves to have debilitating effects on its members.

Prophecy, 8 Antioch Rev. 193 (1948); Morgan, *Female and Male Attitudes Toward Life: Implications for Theories of Mental Health* 6 Sex Roles 367 (1980); Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex Role Stereotypes: A Current Appraisal*, 28 J. of Soc. Issues 66 (1972).

The exclusion of women from the military both repeats and magnifies broad stereotypes and generalizations about men and women. Because, in this stereotyped view, women's abilities and proper roles are different from men's and because men have traditionally dominated the military, stereotyping leads to the conclusion that women are not fit for military service. Women are believed to be physically incompetent, cowardly, and unable to withstand stress. They are seen as weak. Defense of the society and the power that accompanies that role are therefore entrusted solely to men. Feld, *Arms and the Woman*, 4 Armed Forces and Soc'y 557, 564 (1978). Women are disrespected for their "non-male" characteristics and resented for what is perceived as their "easy time." I. Frieze, J. Parsons, P. Johnson, D. Ruble, & G. Zellman, *Women and Sex Roles: A Social Psychological Perspective* 280-89 (Norton ed. 1978). Moreover, the hold of these biases is strengthened by the fact that women are not present in the conscripted class. Therefore, women are unable to demonstrate that they do not conform to stereotyped expectations.

Indeed, the view of women as weak and unfit for service contributes to tangible harm to women for two related reasons. Men perceive women as weak and vulnerable and are therefore more likely to attack them than to take on another man.[17] The staggering incidence of rape and domestic violence is eloquent testimony to this fact.[18] Second, women internalize the view of them-

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[17] *See generally* S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975); L. Walker, *The Battered Woman* 35-39 (Harper Calaphon ed. 1980); Burt, *Cultural Myths and Supports for Rape*, 38 J. of Personality & Soc. Psych. 217, 229 (1980).

[18] An estimated 225,000 women were victims of violent sexual assault (rape) by men in 1975. Schram, *The Victimization of Women: Rape*, 3 Women's Policy Stud. at 77-78 nn. 1&2 (1978). A study of a nationally representative sampling of 2,134 couples showed that in 3.8% of them, the man in the past year had subjected the woman to one or more acts of violence that resulted in, or

selves as weak and incapable of self-defense, which renders them unprepared and passive in the face of attack. Recent studies show that women who take an immediate aggressive response to a rape attempt greatly enhance their chances of escape.[19] In sum, by literally prohibiting women from undertaking certain activities and fostering the belief that they do not undertake them because they *cannot*, the MSSA promotes behavior consistent with the stereotyped image.

The continued exclusion of women from eligibility for compulsory military service delivers a clear message to both women and men that women are incapable of defending themselves or their nation. Although the facts show otherwise, so long as the military, a powerful and central social institution, continues to broadcast the false message that women as a class are not fit to defend their country, men and women will continue to act and react based on that fallacy. As the court said in *Hoover* v. *Meiklejohn*, "[T]he Constitution does not permit the use of governmental power to control or limit cultural changes or to prescribe masculine and feminine roles." 430 F. Supp. 164, 169 (D. Colo. 1977).

III. The Exclusion of Women From the Pool of Registrants Consigns Them to Second-Class Citizenship.

Compulsory universal military service is central to the concept of citizenship in a democracy. M. Janowitz, *Military Conflict*, *supra* note 2, at 76; Feld, *Arms & the Women*, 4

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carried a high risk of, serious injury. Straus, *Wife Beating: Causes, Treatment, and Research Needs*, *in* U.S. Commission on Civil Rights, *Battered Women: Issues of Public Policy* (1978). *See also Battered Women: A Psychosociological Study of Domestic Violence* (M. Roy, ed. 1977); R. Gelles, *The Violent Home* (1974).

[19] *See, e.g.*, Bart, Avoiding Rape: A Study of Victims and Avoiders 13, 16-17, 22 (Study for National Institute of Mental Health, 1980); McIntyre, Victim Response to Rape: Alternative Outcomes 3 (Bureau of Social Science Research, 1980). *See also* Boulding, *Women and Social Violence*, 30 Int'l Soc. Sci. J. 801 (1978).

Armed Forces & Soc'y 557 (1978). Indeed, the responsibility to bear arms in a time of national peril is "the ultimate duty of American citizenship." *Trop* v. *Dulles*, 356 U.S. 86, 112 (1951) (Brennan, J. concurring). *See also, The Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873); *Arver* v. *United States*, 245 U.S. 366, 378-79 (1918); *Self* v. *United States*, 150 F.2d 745 (4th Cir. 1945); *In re Martinez*, 73 F. Supp. 101, 108 (W.D. Pa. 1947). Although the MSSA proclaims that the "privileges and obligations of serving [are to] be shared generally in accordance with a system of selection which is fair and just . . ." (50 U.S.C. App. § 451(c)), it stands in fact as a profound and far-reaching exception to the fundamental principle that the quality of an individual's participation in the life of our nation should not vary based solely on his or her gender.

Being called to serve one's country on the same basis as other citizens has significant psychological and political impact. It is a statement about the value of the contribution that the community expects the individual to be able to make. Society is willing to entrust its well-being and survival to those called; any group not called is tacitly told that its members cannot be trusted to act in the common interest.[20]

The obligation to serve has often been cited as a rite of passage to adulthood because it brings large political concerns to bear on the individual in a very intense way.

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[20] *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 698 (1856) made the link between military service and the concept of citizenship explicit. Black civil rights leaders have shown a keen awareness of the value of military service in attaining full participation in the community. Goodman, *supra* note 2, at 247-48; Feld, *supra* at 564. Similarly, the recognition that young people were subject to compulsory registration and induction was an important factor in the ratification of the twenty-sixth amendment giving eighteen-year olds the right to vote.

As Senator Kassebaum observed:

> Perhaps even more important, is the fact that women should not be excluded from participating in a process which represents commitment to our Nation and its principles. Whether or not registration effectively enhances our military mobilization capability, this concept of commitment is crucial. Registration instills a sense of responsibility and awakens young people to the necessity for active involvement in the political process. This is true for both men and women.

126 Cong. Rec. S6531 (daily ed. June 10, 1980).

Depriving a group of these politically maturing experiences (which are provided to others in the society) inevitably hinders the political growth of the members of the excluded group. When the exclusion coincides with an immutable characteristic such as race or sex, historically considered a sign of inferiority, the detrimental effects are compounded, delivering a verdict of inferiority and second-class status. *See, e.g., Duren* v. *Missouri*, 439 U.S. 357, 369 (1979); *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). Consequently, women are told that they are peripheral to the central arena of events and ideas.

Performance of military service engenders a feeling of "entitlement" to direct the life of the community to whose survival one has contributed. As Chief Justice Field of the Massachusetts Supreme Court observed, "From the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the state, particularly in war." *Brown* v. *Russell*, 116 Mass. 14, 17, 43 N.E. 1004, 1006 (1896). As members of the class required to serve under the MSSA, all men feel "entitled" whether or not they serve personally, simply because they are "at risk" by virtue of their sex. Conversely, because all women are ineligible and are therefore not "at risk" solely by virtue of their sex,

many feel that women as a class are not "entitled" to equal rights and to a leadership role.[21] The pitifully small number of women in positions of political power bears out this fact. *See Frontiero* v. *Richardson*, 411 U.S. at 686 n.17. In the 97th Congress, for example, there are two women in the Senate and 10 women in the House. Only five percent of federal judges are women. Over the past 25 years, notwithstanding occupational and educational gains made by women, only six women have served in the Cabinet.[22] Even if women's participation continues to grow at the present rate, it could take hundreds of years for women to achieve positions of political leadership in numbers approximating their representation in the population.

While the correlation between femaleness and political officeholding is low, the correlation between military service and political officeholding is extremely high. After most of the wars in our history we have elected a military leader president, and military heroism is seen as high qualification for public office. At least 65 percent of the Congressmen serving in the 96th Congress had served in the armed forces. *See generally U.S. Government Printing Office, 1979 Official Congressional Directory, 96th Cong., 1st Sess.* (1979).

In sum, the exclusion of women as a class from eligibility for compulsory military service has devastating long term psychological and political repercussions. It excludes women from the compulsory involvement in the community's survival that is perceived as entitling people to lead it and to derive from it the full rights and privileges of citizenship. It consigns them to a second-class status wholly at odds with our basic democratic commitment

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[21] Feld, *Arms & the Woman, supra.*

[22] Statistics provided by the Eagleton Center for the American Woman and Politics, Rutgers University, New Brunswick, N.J. As of 1979, only 3% of state trial and appellate judgships were held by women and in seventeen states, no women held these positions.

to equality for all. This Court should not countenance such a result.

IV. Permitting Women to Serve as Volunteers Neither Alleviate the Harmful Effects of Excluding Them From Registration Nor Justifies that Policy.

It is contended that exclusion from the draft is unimportant because women are permitted to join the military as volunteers. In addition to being patently discriminatory on its face, this argument overlooks the glaring fact that service for women volunteers is utterly dissimilar to service pursuant to a draft. *See Use of Women in the Military, supra* (J.A. at 112, 152).

First, the numbers of women volunteers are limited by the arbitrary policies restricting their utilization. That means that women are inevitably only a small presence in the groups in which they serve. For several reasons, that fact inhibits the performance of the women. As members of a minority within the military, women are highly visible. Everything they do is seen as caused by their sex and is generalized to the other women in the group. Their loyalty to the group and the strength of their commitment to remain in it are likely to be constantly tested by their male colleagues. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 Am. J. of Soc. 965 (1977).

This phenomenon is intensified in the military because it is a traditionally male institution. The women who join are not only a small percentage of the forces; they are also doing something considered odd or unusual for a woman. Few women can be expected to endure the pressures and stigma associated with this role willingly. *See* D. Gottlieb, *Babes in Arms: Youth in the Army* 39-40 (1977); M. Segal, *supra* note 2, at 7-9. If everyone must register, however, the role of soldier would no

longer be considered aberrant for a women. A greater acceptance of women as co-professionals and co-equals could then occur.[23]

Other structural considerations prevent the volunteer option from according women equality. The same problems and excuses for failing to hire women which were made by employers subject to Title VII of the Civil Rights Act of 1964 have cropped up in the military. Housing, clothing and equipment are either not sufficiently available or are inadequately adapted to women's needs. For example, almost half of the overseas positions in the Air Force are closed to women because of an alleged lack of housing. *Use of Women in the Military, supra* (J.A. at 127). Clothing and equipment are often so ill-fitting that they interfere with safety and performance. *Hearings on Women in the Services Before the Subcomm. on Military Personnel of the House Armed Services Comm.*, 96th Cong., 1st Sess. (Nov. 15, 1979) (statement of Sally K. Richardson, Chairperson, Defense Advisory Comm.). As volunteers, women are treated poorly because there is no commitment to their long-term presence in the military.

The volunteer system for women is also inadequate because it keeps women in the low paid, low skill positions in the military. *Use of Women in the Military, supra* at 7. Experience in the private sector has shown that the mere fact of removing a formal bar to nontraditional opportunities will not suffice to change old and comfortable patterns of behavior.[24] In order to change

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[23] *See* Pennick & Doscher, Male Perceptions and Attitudinal Changes: Second Interim Report on a Study of Women at DRRI (Feb. 1977, Defense Race Relations Instit., Patrick A.F.B., R.I.); Shalit, *Strategies of Change Leading to Equity Between Men and Women with Specific Implications for the Military Organization*, 31 Human Relations 309 (1978).

[24] The slowest rate of growth of women workers over the past decade has occurred in traditionally "male" jobs. *See* Dept. of

old patterns, the armed services must see women as permanent members of the force, whose capability and potential must be developed for maximum benefit to our military forces and to women.[25]

The limitations imposed upon the number of women in the military reinforces segregation in significant numbers of civilian occupations. The military is our largest vocational and professional training institution. Many skilled jobs in the private sector of the economy are filled almost entirely by persons trained by the military. Civilian training in such skills, is, for that reason, generally not available. Eighty percent of the civilian airline pilots for example, are trained in the military. Hoiberg, *supra* note 2; Goodman, *supra* note 2, at 244 n.18. As long as the military pool receiving that training remains all-male, women will be locked out of these fields.

The limited number of women veterans also has detrimental consequences for women's position in the civilian economy. This Court is familiar with the extensive network of veterans' preference laws. *Cf. Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256.

Labor Bull. No. 2080, *supra* note 3. Despite the passage of Title VII in 1964, women still remain largely in traditionally female occupations. *Id. See also* Harrison & Dahl, Vocational Education Equity Study (U.S. Office of Educ. Contract 300-77-0318, 1979) (reporting the need for strong encouragement in order to change school age children's sex-segregated patterns of selection of vocational courses); R. Kanter, *Men and Women of the Corporation* (1977).

[25] In light of the difficulty of being in an all-male institution, there will be pressures on the women soldiers to fill traditionally "female" jobs. Indeed, the first group of women volunteers did that. Only when numbers grew did the "male" specialties start to be open to women. Once in these jobs, women discover that they can perform them and feel a sense of accomplishment at having met a new challenge. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women, supra;* Gottlieb, *supra* at 53-54 (1977); Durning, Women's Experience in Male-Dominated Career Fields and Work Groups (paper presented at the Annual Convention of the Western Psychological Ass'n, 1977).

The significant employment preferences which veterans receive often give them a lifelong advantage in the workforce.[26] The equitable way to remedy the disparate impact that these programs have on women is to register and induct young people into military service based on ability, not sex.

The situation faced by women volunteers is thus in no way equivalent to service pursuant to registration and induction. Nor is it constitutionally acceptable as a substitute. *See Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 64 L.Ed.2d 107, 116. The volunteer alternative cannot cure the blatant discrimination of the MSSA.

CONCLUSION

The slow process of dismantling stereotypes and starting to see people as individuals can only occur if the cycle of old expectations and behaviors is broken. The exclusion of women from registration must end because it does not serve the goal of an effective military and because it powerfully reinforces stereotyped beliefs about women and their role in our society. The cycle cannot be broken as long as the government continues through its military exclusion policy to lend unwarranted and harmful credence to the stereotypes that fuel it.

For the reasons set forth above, the judgment of the district court should be affirmed.

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[26] Veterans, as well as members of the services, also receive substantial educational, insurance, medical, housing and retirement benefits. *See* Goodman, *supra* note 2, at 245 n.19 and statutes cited therein.

Respectfully submitted,

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NO. 80-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER,
DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE ORTHODOX JEWISH COALITION ON THE DRAFT, *AMICUS CURIAE*

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SUPREME COURT OF THE UNITED STATES
October Term, 1980

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v.

ROBERT L. GOLDBERG, et al.,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE ORTHODOX JEWISH COALITION ON THE DRAFT

This brief is being filed with the consent of the parties.

The Orthodox Jewish Coalition on the Draft is an *ad hoc* umbrella group of the major Orthodox Jewish organizations in this country and includes: Agudath Israel of America, Central Rabbinical Congress, Mosdos Bobov, National Council of Young Israel, National Society for Hebrew Day Schools (Torah Umesorah), National Jewish Commission on Law and Public Affairs (COLPA), Poalei Agudath Israel, Rabbinical Alliance of America, Rabbinical Council of America, Religious Zionists of America, Union of Orthodox Jewish Congregations of

America (UOJCA), Union of Orthodox Rabbis of the United States and Canada, United Lubavitch Organization, and the United Satmar Community.

INTEREST OF THE AMICUS

The Orthodox Jewish Coalition on the Draft ("Coalition") represents the entire spectrum of Orthodox Judaism in America. The Coalition is comprised of organizations representing over a million people who share the most profound appreciation of our Nation's democratic principles—particularly the traditions of religious freedom and mutual tolerance—which have enabled them to thrive culturally and spiritually. The Coalition was formed to voice the strong opposition of the Orthodox Jewish Community to the inclusion of women in the Selective Service System.

As Americans, Orthodox Jews share the concern of their fellow citizens for the maintenance of the fabric of American society. As members of a minority faith which has historically been victimized by international conflicts, they are peculiarly sensitive to issues affecting the military security of the Nation which has given them shelter and granted them equality under the law.

The Coalition believes the conscription of women would rend our society as perhaps no other issue could. On an individual level, it would promote rootlessness and the dissolution of the family unit which has long served as a stabilizing element in society. Socially, it would create conflict and disharmony between the majority of our society and substantial minority groups who could not conscientiously cooperate with it. Thus, the Coalition believes that the conscription of women would cause untold damage to the American way of life and the particular way of life of Orthodox Jewish religionists. It would undermine national unity, subvert our national resolve,

and introduce irrelevant and divisive elements into our defense efforts. This Nation's ability to defend itself in time of emergency would thereby be compromised.

As the representative of Orthodox Jews, the Coalition has an even more directly compelling reason to oppose the registration and drafting of women. The highest Orthodox Rabbinic authorities have ruled that *as a basic tenet of Jewish Law,* relating to its code of modesty and chastity, Jewish women are enjoined from cooperating with or submitting to conscription. Thus, if the district court is upheld, Orthodox Jewish women would be placed in an impossible dilemma—the choice between obedience to the law of the land and violation of a binding tenet of their faith. (See testimony of Rabbi Herman Neuberger, Hearings of the House Subcommittee on Military Personnel, March 5, 1980.

The Coalition is mindful of the fact that in the State of Israel, where women are subject to the draft, the law effectively provides an exemption for women on religious grounds. However, it is not certain that Congress would enact a similar exemption, nor that such an exemption would withstand constitutional scrutiny.

The Coalition is also aware that since Jewish law would prohibit Jewish women, on religious grounds, from any participation whatever with the selective service, they may arguably be covered by §6(j) of the Universal Military Training and Service Act—providing for exemption to those who "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." However, by its terms that exemption relates only to "combat training and service in the Armed Forces of the United States" and would leave open conscription for alternative service which, as noted, is equally forbidden by Jewish Law.

Hence the issue of the continuance of the male-only draft is of vital concern to the Coalition.

QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT ERRED IN APPLYING STANDARDS DEVELOPED IN SEX-DISCRIMINATION CASES IN CONSIDERING THE VALIDITY OF THE EXCLUSION OF WOMEN FROM CONSCRIPTION UNDER THE MILITARY SELECTIVE SERVICE ACT ("THE ACT").

II

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE ACT'S INVALIDITY UPON A FINDING THAT THE EXCLUSION OF WOMEN FROM CONSCRIPTION WAS NOT "SUBSTANTIALLY RELATED" TO THE "IMPORTANT GOVERNMENT OBJECTIVE" OF ENHANCING MILITARY FLEXIBILITY, WHILE FAILING TO CONSIDER THE ACT'S IMPACT ON OTHER SUBSTANTIAL GOVERNMENT INTERESTS.

PRELIMINARY STATEMENT

This case involves a determination by a district court that the Military Selective Service Act unconstitutionally discriminates between males and females because the gender-based distinction in the statute was not "substantially related to important governmental objectives." The court based its ruling on its findings that women were successfully being used by the military as volunteers and "[military] flexibility is not enhanced, but is in fact limited by the complete exclusion of women." (Jur. St., 43a)

We submit that the district court erred in viewing the

issue as one of invidious gender based discrimination thereby raising equal protection questions. Furthermore, assuming that the court properly identified the issue, in determining that the Act is not "substantially related" to "important government objectives," it nonetheless erred in failing to consider all of the public interests which Congress evaluated.

ARGUMENT

POINT I

BECAUSE FEMALE CONSCRIPTION RAISES ISSUES DISTINCT FROM MILITARY SERVICE, EXCLUSION OF WOMEN FROM THE DRAFT FOR SUBSTANTIAL REASONS OF PUBLIC INTEREST IS NOT A "BADGE OF INFERIORITY" AND DOES NOT STIGMATIZE WOMEN.

The parties in this litigation have presented the issue, and the court below has viewed it, as a question of gender based discrimination. Their dispute has turned on a difference over the proper standard to be applied in analyzing the Act's constitutionality. The government argues that a Congressional determination involving national defense shall be reviewable under the "rational relationship" test as applied in *Schlesinger v. Ballard,* 419 U.S. 498 (1975). Appellee contends, and the court below held, that the "important government interest" test applies. (See *Craig v. Boren,* 429 U.S. 190 (1976).) The district court also noted that "[g]ender discrimination is a badge of inferiority and must pass constitutional review whether or not it is for the benefit of women . . . . Equal protection involves protection from seemingly well-intentioned classifications that in fact relegate women to an inferior status." (Jur. St. 15a, footnote and citations deleted).

This limitation of the controversy, and the district court's reasoning is flawed. Gender based discrimination is not the principal issue at bar because the Act was neither designed to benefit or to disadvantage women, nor is there any evidence that it is so perceived. Rather, it balances the national need for an available pool of potential military manpower, for times of emergency, against the social disruption and unknown risks that conscription of women would entail. Congress expressly recognized that

> [t]he question of who should be required to fight for the nation and how best to accomplish that end is a social issue of the highest order, with sweeping implications for our society. In addition to the military reasons, which the Committee finds compeling witnesses . . . testified before the Subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in a time of emergency. If such a draft occurred at a time of emergency, unpredictable reactions to the fact of female conscription would result.

Report of the Senate Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, 5 (April 22, 1980) (R 878).

Thus, the attention of Congress was clearly on the social impact, and potential danger to military preparedness which would result from a novel experiment in female conscription. The potential danger was identified as feared unrest caused by widespread social or conscientious opposition to, and non-cooperation with, female conscription. It was not based on an invidious judgment of women's capacity to serve, usefully and honorably, in the armed forces. Consequently, the exclusion of women from *conscription* is an issue which involves separate and distinct interests and considerations from the issue of *service* of women in the armed forces. There is in the Act. no

implication whatever, that women could not honorably serve in the armed forces (in fact they do so and Congress encourages such participation), and no question of invidious discrimination or "badge of inferiority" is presented.

Congress can certainly employ gender-based discrimination in framing public policy where the distinctions are reflective of a reality that men and women are not similarly situated—even when that reality is the result of other legislative or policy judgments. *Schlesinger v. Ballard*, id., at 508.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO PLACE IN THE BALANCE THE CONFLICTING SOCIAL INTERESTS WHICH, IN ADDITION TO THE MILITARY QUESTION, FORMED THE BASIS FOR CONGRESS' DETERMINATION TO EXCLUDE WOMEN FROM THE DRAFT.

It cannot be gainsaid that the question of the participation of women in the Selective Service System has been one of the most publicly debated issues in recent years. While this certainly does not preclude judicial involvement, the essence of the debate indicates that what is involved here is a deep-rooted social value related to the kind of society that Americans wish to have. Plaintiffs and the court below have throughout this litigation characterized the underlying issue as being whether women are entitled to equal opportunity. This is not the case. What is at issue here is whether or not the American society wishes to have it that women will be *compelled* to serve in the military. The differing treatment of the sexes in the connection with military conscription is simply a recognition of differing roles that women actually play in

society. A substantial portion of our society, probably a majority, as a whole, both men and women, simply do not look to women to defend the country. Conversely, nowhere is it claimed that individual women should be denied voluntary participation in the military or that women in most non-combat positions cannot perform adequately.

Moreover, in its report (*see supra,* p. 6), the Senate Subcommittee concluded that, "there are important societal reasons for not changing our present male-only system of registration and induction. The question of who should be *required* to fight for the nation . . . is a social issue of the highest order, with sweeping implications for our society." The report also cited the testimony of "witnesses representing a variety of groups . . . that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency." The subcommittee further recognized that substantial and unpredictable risks to military preparedness may be raised by female conscription. Congress, therefore had evidence of the impact on basic institutions of society that registration of women would have. Whether plaintiffs, the lower court, or indeed this court differs with Congress's assessment, it is Congress's assessment to make under our system.

Throughout this litigation there has been much discussion as to the appropriate judicial standard to apply to the Congressional determination to limit conscription to men.

This court has had a number of occasions over the past decade to issue guidelines on the meaning of the equal proaching certainty." id. What is certain, however, is that classification. However, as noted by Mr. Justice Brennan "the standard of review to be applied . . . has been a subject of considerable debate, compare *Schlesinger v.*

Ballard, 419 U.S. 498 (1975), with *Craig v. Boren,* 429 U.S. 190 (1976)." (Jur. St., 50a). Moreover, the application of the appropriate standard in a case involving the selective service "cannot be predicted with anything approaching certainty." What is certain, however, is that whichever standard is applied all of the governmental interests which are affected by the legislation under review, and which were considered by Congress, must be placed in the balance by the reviewing court. Congress' concerns at bar included its recognition that female conscription would, in one fell swoop, utterly transform American Society and would create risks for mobilization of our armed forces in times of crisis. Congress was not solely concerned with the problem of integrating women within the military but, with its effect on the mobilization process and the national resolve of our citizenry in a time of extreme crisis. Indeed Senator Heflin expressed the view that "the opposition to registering women is so widespread and pervasive that if women were required to register it might jeopardize the whole registration program." 126 Cong. Rec., S. 1242 (February 7, 1980). The district court's application of the "substantial relationship" test (See *Craig v. Boren*) was thus improperly done. Its analysis of the applicability of the test centered exclusively on the ability of the Armed Forces to operate with sufficient "flexibility." What was totally ignored was Congress's stated concern about the impact on mobilization of the inclusion of women in the draft and our national resolve. That it would create unacceptable risks at a time of emergency is certainly a judgment that Congress should make irrespective of which "test" is applied.

CONCLUSION

The determination of the district court, having been based on a selective view of the record, and having failed to consider substantial governmental interests which underlay Congress' action, is fatally flawed and should be reversed.

Respectfully submitted,

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No. 80-251

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Supreme Court of the United States
OCTOBER TERM, 1980

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DIRECTOR OF SELECTIVE SERVICE,
Appellant

v.

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BRIEF FOR AMICI CURIAE

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INTEREST OF AMICI CURIAE

With the consent of both parties, this brief is filed on behalf of the Women's Equity Action League Educational and Legal Defense Fund (WEAL Fund), Women's Equity Action League (WEAL), Federally Employed Women, National Women's Student Coalition of the United States Student Association, Women Lawyers' Association of Los Angeles, Federation of Organizations for Professional Women, American Association of University Women,

National Federation of Business and Professional Women's Clubs, Inc., League of Women Voters of the United States, Catholics Act for E.R.A., Michigan Education Association Women's Caucus.

Each of these groups is a national or regional organization working to assure equal opportunity and the equal protection of the laws for all citizens of the United States. Many have been particularly concerned with the status of women in the military. The WEAL Fund, for example, established the National Coalition for Women in Defense to protect and extend the rights of women employed by the armed services. It has also presented testimony to Congress and prepared publications on women in the military.

These groups can convey an important perspective to this Court not represented by the two parties. Besides the expertise they bring to the specific issue of women's participation in the armed forces, they are particularly concerned about the existence of stereotypical views on women's place in society which they believe underlie the concept of an all-male draft registration. Since appellees are all male citizens, they may not fully address the concerns of women who believe that equality under the law is not served by their absolute exclusion from registration.

SUMMARY OF ARGUMENT

Equal rights for men and women mandate an end to an all-male draft registration. The exclusion of women from registration is based solely on archaic notions of women's role in society which this Court has explicitly rejected as a valid foundation for legislative classifications. It echoes the stereotypic notions about women's proper place in society that in the past promoted "protective" labor laws and the exclusion of women from juries and the legal pro-

fession. Until women assume their equal share of societal obligations, they will retain their inferior status.

The appropriate standard for review is the prevailing test for sex-based classifications first enunciated in *Craig* v. *Boren*. Any dilution of the standard of review for gender-based classification would undermine the strides towards equality which this Court has charted in the last decade. Heightened review of the all-male registration, and a finding of its unconstitutionally will help to assure that women are not judged on the basis of their sex, but instead evaluated on their individual abilities.

This Court has applied its heightened standards of review in race and sex discrimination cases involving the military. The Government's contention that this Court's decision in *Schlesinger* v. *Ballard* dictates the more relaxed, rational basis standard of review is erroneous. As the opinion itself reveals and this Court later acknowledged, that case applies an intermediate level of scrutiny. Moreover, *Califano* v. *Webster* definitely establishes that the *Craig* standard applies in cases which, like *Ballard,* involve statutes designed to compensate for discrimination against women.

The District Court correctly applied the standard this Court has employed in *Craig* and its progeny. The Government's argument that the male-only registration requirement is mandated by the existing prohibitions against women in combat is unsupported by the evidence presented to the Congress. The purpose of registration is to provide the means for early delivery of inductees in an emergency. Military witnesses who testified on the registration issue, including the then members of the Joint Chiefs of Staff, indicated that this purpose would be served by including women in the registration, and recom-

mended that women be so included. No government military witness testified that registering women would, because of the combat bar, diminish military flexibility. Moreover, the Government itself concedes that the combat bar may be eliminated at any time. In view of this, registering women today can only increase military flexibility and the military's ability to mobilize, should the combat bar eventually be eliminated.

Apart from this, this Court should not uphold the constitutionality of one statute on the basis of another statute or policy which, while not at issue here, is itself presumptively unconstitutional. The combat bar is facially discriminatory; that is, it exempts all women, no matter how willing or able any individual woman might be, from combat, close combat support or combat rotation positions. Thus it raises the presumption of unconstitutionality and therefore requires careful analysis of the reasons for adoption of the bar. Without such review, which cannot be had here since the combat issue itself is not before the Court, no assumptions can be made that the bar is constitutional and therefore justifies other forms of discriminatory treatment.

Schlesinger v. *Ballard* does not support the Government's theory to the contrary. There the statutes in question — which allowed female navy officers more time to achieve promotion than men — were upheld by this Court as a remedial measure designed to alleviate the discriminatory effects of the combat bar, which limited women's employment opportunities and consequently their opportunities for promotion. Here, however, the prohibition against registering women has no such remedial purpose. Instead, it creates a second barrier to women's full participation in the military and reinforces women's second-class status as citizens.

Thus, the total exclusion of women from draft registration violates the Due Process Clause of the Fifth Amendment. The Court may repair that constitutional defect either by invalidating the statute or by extending its provisions to include women.

ARGUMENT

I. THE ALL-MALE DRAFT REGISTRATION REINFORCES SEXUAL STEREOTYPES AND DENIES WOMEN EQUAL RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP

The all-male draft registration[1] is based on stereotypical views about women which are completely at odds with contemporary reality. *Califano* v. *Goldfarb,* 430 U.S. 199, 207 (1977). It denies women the opportunity to participate fully in the responsibilities as well as the rights of citizenship.

The underlying basis of an all-male registration appears in earlier cases challenging the draft, in which the courts candidly acknowledged the Congressional rationale:

> In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.

United States v. *Cook,* 311 F. Supp. 618, 622 (W.D. Penn. 1970), *citing United States* v. *St. Clair,* 291 F. Supp. 122 (S.D.N.Y. 1968). It is precisely this "Congressional chivalry in drafting men only," *United States* v. *Clinton,* 310 F. Supp. 333, 336 (E.D. La. 1970), that perpetuates the myth that women are in need of protection, and relegated to the sphere of home and family.

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[1]The Military Selective Service Act, 50 U.S.C. App. § 451 *et seq.* (the "MSSA").

There is evidence that the recent failure to require women as well as men to register was premised on similar assumptions. In its report recommending the exclusion of women from registration, the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Forces relied on the "unprecedented strains on family life that would be caused by a female draft." 126 Cong. Rec. S 6531. (daily ed. June 10, 1980) (remarks of Sen. Warner). By ignoring the family trauma also generated when males are drafted the committee perpetuated the "role-typing society has long imposed on women." *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975).

The exclusion of women from draft registration reinforces the notion that women are destined to remain in the home, and that only the male is fit for "the marketplace and the world of ideas." *Id.* at 14-15. It ignores the vast data indicating that women have successfully served in the armed forces and make a substantial contribution to the military. *See* p.13 n.11, *infra.* It disregards the expertise of military authorities who overwhelmingly favored the inclusion of women in draft registration. *See* p. 28, n.23, *infra.* It further overlooks the increased participation of women in vocations from which they have been traditionally excluded.[2] Selective Service authorities recognized

[2]The same stereotypical thinking about the role of women in society which currently prevents women from serving in combat once prevented women from serving as police officers. Aided in part by litigation, women are now generally deployed throughout police departments. *See Blake* v. *City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979); *Officers for Justice* v. *Civil Service Commission of San Francisco,* 395 F. Supp. 378 (N.D. Cal. 1975). Studies have shown that women police officers perform acceptably in critical tasks, *e.g.,* high risk felony vehicle stops, use of firearms and carrying prisoners or victims in varying terrain. *See* National Information and Research Center of Women in Policing, Performance Evaluations Information Packet (June 1980).

that the administration policy favoring the registration of women

> is a recognition of the reality that both men and women are working members of our society. It confirms what is already obvious throughout our society – that women are now providing all types of skills in every profession. The military is no exception.

Military Draft Registration: Senate Hearings Before the Committee on Appropriations on H.J. Res. 521, 96th Cong., 2d Sess. 80 (1980).

The all-male registration is one of a myriad of practices that have fostered discrimination against women under the guise of a concern for women's health, safety, and "rightful" place in the home.[3] *Muller* v. *Oregon,* 208 U.S. 412, 420-22 (1908) was once the authority for upholding a host of protective labor laws. It is now apparent that that case served as a "road block to full equality of women"[4] because the single sex labor laws prevented women's access to the more lucrative employment opportunities.[5] In *Muller,* the Court expounded the view that:

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[3]*See e.g., Goeseart* v. *Cleary,* 335 U.S. 464, 466 (1948), overruled by *Craig* v. *Boren,* 429 U.S. 190, 210 n.23 (1976); *Radice* v. *New York,* 264 U.S. 292 (1924) (upholding statute preventing women from working in restaurants at night); *Miller* v. *Wilson,* 236 U.S. 373 (1915) (upholding maximum eight hour day and forty-eight hour work week for women).

[4]Johnston and Knapp, *Sex Discrimination by Law: A Study of Judicial Perspective,* 46 N.Y.U. L. Rev. 675, 698 (1971), *quoting* Murray, *The Rights of Women,* in *The Rights of Americans* 521, 525 (N. Dorsen ed. 1971).

[5]These laws have repeatedly and successfully been challenged under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. See, e.g., Rosenfeld* v. *S. Pac. Co.,* 444 F.2d 1219 (9th Cir. 1971).

> woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . [H]er physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.

Id. at 422.

The guise of protectionism has not only permeated the workplace, but has even entered the courtroom. The same rationale for excluding women from the draft and registration – that they are physically and psychologically weaker than men and constitute the center of family life – has been offered to prevent them from becoming lawyer.[6] These concerns have also been expressed in cases upholding the exclusion of women from juries:

> The legislature has the right to exclude women so they may continue their service as mothers, wives and homemakers, and also protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.

State v. *Hall,* 187 So.2d 861, 863 (Miss.), *appeal dismiss-*

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[6]"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." *Bradwell* v. *Illinois,* 83 U.S. (16 Wall) 130, 141-42 (1872) (Bradley, J., concurring).

ed, 385 U.S. 98 (1966). *See also Hoyt* v. *Florida,* 368 U.S. 57 (1961).[7]

In recent years, the courts have struck down such discriminatory provisions and have recognized that measures once justified on the grounds that they protected women have not in fact protected them but have operated to their detriment.[8] *See, e.g., Frontiero* v. *Richardson,* 411 U.S. 677, 684. ([D]iscrimination . . . rationalized by an attitude of 'romantic paternalism' . . . in practical effect, put[s] women, not on a pedestal, but in a cage.") The male-only registration likewise operates to the detriment of women.

The total exclusion of women from registration and possible conscription deprives them of significant economic benefits as well as important social and political rights. Higher enlistment standards and quotas for women have created barriers to female enlistment. This tradition,

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[7]In *Hoyt,* the Court upheld the absolute exemption of women from jury duty on the grounds that "woman is still regarded as the center of home and family life." *Hoyt* v. *Florida* 368 U.S. at 62. *See also Leighton* v. *Goodman,* 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970), which asserted that the great majority of women "constitute the heart of the home, where they are busily engaged in the 24-hour day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demand their full energies." *Cf. Abbott* v. *Mines, 411 F.2d 353, 355 (6th Cir. 1969).*

[8]*See Duren* v. *Missouri,* 439 U.S. 357 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Rosenfeld* v. *S. Pac. Co.,* 444 F.2d 1219; Babcock, et al, *Sex Discrimination: Causes and Remedies* 270-71 (listing cases striking down single-sex labor laws).

coupled with exclusion from registration, conveys the message that it is not suitable for most women to participate in military duty and to receive its concomitant benefits.

The defense establishment is the largest single employer in the United States. M. Binkin and S. Bach, *Women and the Military* 31 (1977). As is frequently advertised in recruiting drives, the armed services provide important paid training and experience in a wide variety of occupations. *Id.* The military offers women "nontraditional" occupations which provide the qualifications for lucrative employment upon their return to civilian life. Furthermore, unlike the wages received by civilian women, military women receive wages equal to the wages received by men. *Id.* at 32. The earnings of military personnel generally are approximately the same as the earnings of male civilians, which far exceed the earnings of female civilians. *Id.*

The numerous benefits afforded to military personnel are well-known – medical coverage for members as well as their dependents, housing and child care facilities, tax advantages, provisions for burial, and travel and transportation allowances. Other benefits include commissary and exchange privileges and low-cost insurance.

Upon completion of active duty, service veterans may qualify for numerous other benefits: generous pensions, *see* 10 U.S.C. §§ 3883-3992 (Army), 10 U.S.C. §§ 6321-6332 (Navy and Marines), 10 U.S.C. §§ 8883-8992 (Air Force); federal employment preferences, *see* 5 U.S.C. 2108, 3309-3318; burial benefits, *see* 38 U.S.C. §§ 901-908; vocational rehabilitation, *see* 38 U.S.C. §§ 1501-1511; educational benefits for both veterans and their families, *see* 38 U.S.C. §§ 1601-1799;

and home and other loans, *see* 38 U.S.C. §§ 1801-1827. Many states also accord employment preferences to veterans. *See Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979). *See also*, L. Sharff and S. Gordon, 1980 *Uniformed Services Almanac*, 4-153 (1980).

The all-male registration also affects women's social and political rights. Equal rights for women and men include two important, equally significant components. One consists of equal opportunity to share benefits and rights previously limited to men, in such areas as employment, education, and the political process. But true equality also comprises a second aspect: the equal division of societal obligations and duties. If women do not share these responsibilities, the gains made in achieving rights for women will be threatened, viewed as magnanimous concessions to women's demands instead of as prerogatives justly due to equally productive members of society.

This Court has recognized the importance of equal responsibilities as well as equal rights. It has invalidated a state alimony statute that required only men to pay alimony, *Orr* v. *Orr*, 440 U.S. 268 (1979), and struck down a verdict given by a jury in which women were in effect excluded. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Although alimony payments and jury service, like compulsory military service, are viewed by many as a burden, advocates of equality disagree. They view such obligations as "a form of participation in the processes of government, a responsibility and right that should be shared by all citizens, regardless of sex." *White* v. *Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1973) (case striking down exclusion of women from jury duty). As Senator Hatfield said:

> The paternalistic attitude inherent in exclusion of women from past draft registration requirements

> not only relieved women of the burden of military service, it also deprived them of one of the hallmarks of citizenship. Until women and men share both the rights and the obligations of citizenship, they will not be equal.

126 Cong. Rec. 6548 (daily ed. June 10, 1980). Yet, the draft registration statute denies this responsibility to half of the possible participants, simply on the basis of their sex. It prevents women from sharing the burden of conscription with men.

The discrimination inherent in the exclusion of women from draft registration affects many other facets of women's societal role. It reinforces a pernicious stereotype that women should be less involved than men in political affairs.[9] It underscores the view that men who have fought for their country have a special right to wield political power and make political decisions. *See, Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 320 (1970) (testimony of Professor Norman Dorsen).

The inclusion of women in registration would not only signal to men that women are full participants in the political process, but would reinforce the political self-

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[9]Participants in the movement to permit 18 year-olds to vote argued that if 18 year-olds were subject to the draft, they must have access to the political process that affects foreign policy – namely, the vote. The reserve of this argument could be used to support the proposition that because women are not subject to draft registration, they should not have equal rights with men to participate in all political decisions.

image of many women. Military service itself can further this socialization process.[10]

In sum, excluding women from the obligation of registration serves as a powerful symbol of women's secondary role in this society. The statute denigrates women by including all women, no matter how strong, healthy or component.[11] It encourages other forms of discriminatory treatment and reinforces the paternalistic role that serves not to protect women but to exclude them from many of the benefits of society. The exclusion of women from registration "is unnourished by sense; . . . [and] implies a view of American womanhood offensive to the ethos of our society." *United States* v. *Dege,* 364 U.S. 51, 53 (1960).

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[10] [M]ilitary service has a substantial impact on women serving in non-traditional roles. By discovering hitherto unimagined capabilities, their self-esteem and belief in their own worth rises markedly, and they take these attitudes back into civilian life with consequent benefit for American society as a whole.

Women in the Armed Forces: Proceedings of a Congressional Research Service Seminar Held on November 2, 1979 and Selected Readings 11 (February 14, 1980).

[11] Armed services officials have recognized that "the great majority of the women serving in the Army today are doing so with skill, intelligence, energy, excellent discipline, and genuine commitment." Hearings before the Subcomm. on Manpower and Personnel, Senate Committee on Armed Services, March 28, 1979 (testimony of Lt. Gen. Robert G. Yerks, Deputy Chief of Staff for Personnel, U.S. Army).

II. GENDER-BASED CLASSIFICATIONS ARE TO BE SUBJECTED TO THE HEIGHTENED STANDARD OF REVIEW ENUNCIATED IN *CRAIG* v. *BOREN* IN EQUAL PROTECTION CHALLENGES

A. This Court Has Consistently Reaffirmed *Craig* v. *Boren* As The Prevailing Standard Of Review For Gender-Based Classifications

The appropriate standard for the review of the exclusion of women from draft registration is the prevailing test for sex-based classifications first enunciated in *Craig* v. *Boren*, 429 U.S. 190 (1976). In *Craig*, the Court declared that in order to withstand constitutional challenge, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U.S. at 197.

This Court has consistently applied the *Craig* standard to gender classifications in equal protection challenges arising under both the Fifth and the Fourteenth Amendments.[12] It has employed the *Craig* test in cases involving classifications which discriminated against men as well as

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[12] *Compare Califano* v. *Westcott*, 443 U.S. 76, 88 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977) (*per curiam*); *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977) (plurality opinion) (all applying the *Craig* test to cases arising under the equal protection element of the Fifth Amendment's due process clause *with Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979); *Orr* v. *Orr*, 440 U.S. 268, 279; *Craig* v. *Boren*, 429 U.S. 190, 197 (all applying the *Craig* test to cases arising under the Fourteenth Amendment's equal protection clause).

women.[13] The standard reflects the Court's desire to avoid reinforcing unwarranted sexual stereotypes. *see, e.g., Orr* v. *Orr,* 440 U.S. 268, 283 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199, 211 (1977) (plurality opinion). It also serves as an important safeguard against the danger that a purportedly benign statutory provision can actually serve to penalize women. *See Califano* v. *Goldfarb,* 430 U.S. at 209, n.8: *Weinberger* v. *Weinsenfeld,* 420 U.S. 636 (1975).

The Court's consistent use of the *Craig* criterion reflects the importance of a heightened standard of review for gender classifications. Justice Stewart, in recognizing the appropriateness of the use of the *Craig* standard in reviewing sex-based classifications, declared that:

> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.

Personnel Administrator of Massachusetts v. *Feeney,* 442 U.S. 256, 273 (1979). The *Craig* standard is a demonstrably effective mechanism for reviewing the invidious effects of sex-based legislation.

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[13] *Compare Caban* v. *Mohammed,* 441 U.S. 380, 388 (1979); *Orr* v. *Orr,* 440 U.S. 268, 279 (both applying the *Craig* test to classifications discriminating against males) *with Califano* v. *Westcott,* 443 U.S. 76, 84 (1979) (applying the *Craig* standard to a classification discriminating against females). Indeed, this Court has held that the same statute could discriminate against both men and women. *Wengler* v. *Druggists Mutual Insurance Co.,* 446 U.S. , 100 S. Ct. 1540 (1980) (applying *Craig*). *See also Califano* v. *Goldfarb,* 430 U.S. 199, 208 (plurality opinion); *id.* at 223 (Stevens, J., concurring). The plurality opinion by Justice Brennan held that the challenged statute discriminated against females, while Justice Stevens concurred in the judgment because he believed the statute discriminated against males.

B. Gender-Based Classifications in a Military Context demand a heightened standard of equal protection review

The Government contends that because registration concerns military affairs, the Court should defer to the judgment of Congress and utilize only a "rational basis" standard of review rather than the intermediate standard enunciated in *Craig* v. *Boren*.[14]

At no time has this Court stated or implied that statutes using race or sex lines in a military context demand a lower standard of review than sex or race classifications in other contexts. To the contrary, this Court's first articulation of the strictest standard of review in race cases occurred in a case involving national security. *Korematsu* v. *United States*, 323 U.S. 214 (1944). There is a sound basis for maintaining a high level of scrutiny in military cases. As the lower court in this case stated:

> It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible violations committed by the Congress or the executive in exercising the war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of

[14]At one point, the government even suggests that this case does not involve a sex-based classification at all, stating that "this case, like *Ballard*, is more properly viewed as involving a distinction between combat eligible and combat ineligible persons . . ., as to which nothing stricter than the rational relationship test need be applied." Appellant's Brief, p. 23. This contention is doubly remarkable since it attempts to recharacterize two different provisions, both of which by their terms exclude all women from their reach. Such provisions cannot possibly be anything but gender-based classifications.

> citizens and therefore may be the one most in need of an appropriate check and balance.

Jur. St. 19a.

Race discrimination was once pervasive in our nation's military. Blacks, like women, were once almost completely barred from combat duty. As recently as the outset of the Korean War, most military leaders believed that blacks were incapable of being effective combat soldiers. R. Dalfiume, *Desegregating the U.S. Armed Forces, Fighting on Two Fronts,* 1939-1953 (1969) 79-98, 188-89, 206. Blacks were drafted under a dual draft system to serve in all black units. *Id.* Such discriminatory policies would of course be judged by the most stringent standard of review were they to occur today, despite their military context. Similarly, gender-based classifications warrant the same heightened standard of review applicable to gender cases arising in the civilian context.[15]

The government's contention that *Schlesinger* v. *Ballard* requires a lower standard of review in military cases is erroneous. Not only might the government theory

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[15]The Court below is not the only one to recognize the need for the *Craig* standard in a military context. In one of the few decisions challenging sex discrimination in the military since this Court articulated the equal protection criteria in *Craig* v. *Boren,* a federal court applied *Craig's* heightened standard of review to a statute imposing a ban on the assignment of women to most Navy ships. *Owens* v. *Brown,* 455 F. Supp. 291 (D.D.C. 1978). *Owens* is similar to this case because the exclusion of women from most Navy ships, like their exclusion from draft registration, was "against the expressed judgment of the military." *Id.* at 309. The court found the exclusion of women unconstitutional. Notwithstanding the military context of the case, the court utilized the *Craig* standard of review, affirming that in sex discrimination cases "a single standard seems to have emerged." *Id.* at 305.

permit a lesser standard of review to be applied to racial classifications in the military, it also fails to take into account the evolution of this Court's sex discrimination precedents. Prior to this Court's decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court applied a relaxed standard of review in gender cases. *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Hoyt* v. *Florida,* 368 U.S. 57 (1961). Beginning with *Reed* the Court applied a heightened standard of review to gender cases, but did not fully articulate that standard until 1976, when, in *Craig* v. *Boren, supra,* 429 U.S. 190, it declared that a gender classification must be "substantially related" to an "important governmental purpose." 429 U.S. at 197. *Craig* refers to the line of cases beginning with *Reed,* and including *Ballard,* as ones in which the Court applied a heightened level of scrutiny. *Id.* at 198-99. *Ballard* itself implicitly relied on the intermediate standard, since in the decision the Court distinguished *Reed* and *Frontiero* not on the ground that a different standard of review applied but on the ground that the gender-based classifications in those cases were based on stereotypes concerning women while the *Ballard* statute served a more important purpose. *See Craig* v. *Boren,* 429 U.S. 190, 198 n.6 ("*Schlesinger* v. *Ballard* . . . rested upon the Court's perception of the laudatory purpose [ ] of [the] law [ ] as remedying the disadvantageous conditions suffered by women in . . . military life.")

Finally, any doubt that the intermediate standard should be applied in cases such as *Ballard* that involve remedial statutes was eliminated by this Court's decision in *Califano* v. *Webster,* 430 U.S. 313 (1977). In Webster, the Court applied the *Craig* standard to a remedial statute and upheld it on the ground that it was substantially related to the important governmental objective of remedying past discrimination in the job market against women.

III. THE ALL-MALE REGISTRATION REQUIREMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Military flexibility needs stemming from restrictions on women in combat do not justify the all-male registration.[16]

The purpose of registration is to create an inventory of human resources available for the national defense[17] and "the means for early delivery of inductees in an emergency." Appellant's Brief, pp. 26-27. Although this purpose is indisputably an important one, the restriction of registration to men is irrational.

By registering both men and women, the pool from which to draw inductees in an emergency in substantially enlarged. Since adding women does not diminish the supply of men, but rather provides a large additional number of persons with a wide range of skills and capabilities which may serve our nation in times of emergency, adding

[16]The District Court dealt at length with the government's argument that all-male registration may be justified on the basis of the current exclusion of women from combat positions. Specifically, the court found that the evidence before the Congress did not support the Government's theory that having large numbers of women registered who, because of the combat bar, could not be deployed into combat or combat-related positions in time of emergency, would diminish military flexibility. Jur. St. 28a-43a. *Amici* believe the court's conclusion on this issue is correct and should be upheld. We do not repeat these arguments in detail here but emphasize instead the principal reasons the government's argument is defective.

[17]See testimony of former Army Chief of Staff Bernard Rogers that "women should be required to register . . . in order for us to have an inventory of what the available strength is within the military qualified pool in this country." Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 96th Cong., 1st Sess. 10 (March 13, 1979).

women to the registration pool could only increase, rather than decrease, the flexibility needed to meet military needs.[18] Of course, the nature and extent of the emergency will determine what kinds of registrants are drafted and in what proportions. Registration merely increases the capacity to meet those emergency needs, whatever they might be.

During the Congressional hearings in 1979 and 1980, the Armed Services were united in their position that registration of women would not diminish military flexibility.[19] Indeed, the witnesses, among whom were the then-

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[18]The Assistant Secretary of Defense for Manpower acknowledged that "[t]he performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women." Jur. St., 41a, n.30 (citing Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Armed Services Comm. 2 (Mar. 5, 1980) (statement of Robert Pirie, Jr.))

[19]*See, e.g.*, opinion of the District Court, Jur. St. p. 30a, n.20; *see also* S. Rep. No. 96-226, 96th Cong., 1st Sess. 13-15 (1979) at 13, 14-15 (testimony of General Bernard Rogers, Army Chief of Staff; Admiral Thomas Hayward, Chief of Naval Operations; General Lew Allen, Jr., Air Force Chief of Staff; and General Louis Wilson, Commandant, U.S. Marine Corp.). Dr. Bernard D. Rostker, Director of the Selective Service System, endorsed the Administration proposal to register women. *Department of Housing and Urban Development — Independent Agencies Appropriations for 1981: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 96th Cong., 2d Sess. 3-4 (Feb. 26, 1980). Secretary of Defense Harold Brown recommended at a January 29, 1979 hearing that women be included in any new legislation requiring registration. 126 Cong. Rec. S6320 (daily ed. June 5, 1980) (remarks of Senator Dole).

During his nomination hearing in 1979, the current Army Chief of Staff, Edward Meyer, testified that ". . . from a purely military point of view, a cataloguing of assets, which is what registration is, is helpful, and therefore, a cataloguing of male and female assets, with a clear understanding that they need never be called, would be useful." S. Rep. No. 96-226, 96th Cong., 1st Sess. 28 (1979).

members of the Joint Chiefs of Staff, assumed women's exclusion from combat positions, yet in spite of this either recommended or did not oppose the registration of women. (See note 19, *supra.*) This plainly constitutes a refutation of the government's argument in this case that the registration of women interferes with military flexibility because of the current bar to women in combat.

Moreover, the government concedes that "there is more than an abstract possibility that the combat restrictions on women could be lifted at some future date," Brief for Appellant at 24, n.23, and acknowledges military efforts to obtain repeal of, or to amend, existing restrictions on assignment of women to combat positions. *Id.* In view of this, excluding women from registration today seems singularly short-sighted. If and when combat bars are eliminated, the military would be in a far better position to meet military needs if persons of both sexes were already registered. Thus, the benefits from registering women are potentially even greater than the military witnesses envisioned in their testimony to Congress.

B. This Court should not uphold the constitutionality of the male-only registration statute on the basis of the bar to women in combat which, while not at issue in this case, is itself discriminatory on its face

The government's argument in support of the male-only registration relies almost exclusively upon the anterior ban on women in combat. As discussed above, the Congressional testimony by military experts failed to provide factual support for such a link between male-only registration and male-only combat positions. For that reason alone, the government's argument should be rejected.

This Court should, in addition, decisively reject the invidious notion that an otherwise unconstitutional gender line can be justified by another gender classification, which itself is discriminatory on its face and therefore presumptively unconstitutional. As a general proposition, if one discriminatory provision justifies another, many discriminatory classifications will escape constitutional scrutiny. Traditional biases against women that manifest themselves in a statutory scheme rather than in an isolated provision will stand a better chance of survival than at present. Thus the whole fabric of laws and policies which discriminate against women will be more difficult to unravel and it will appear that this Court has place its imprimatur upon the assumptions about women and men which underlie the unchallenged gender line used to uphold the discriminatory provision before the Court. *Cf. Parham* v. *Hughes,* 441 U.S. 380 (1979) (plurality of Court used existence of Georgia's gender-based legitimacy law to justify a statute which precluded unwed fathers but not unwed mothers from recovering for the wrongful death of their children).

This court has long since passed the point where statutes employing explicit gender lines can be viewed with a presumption of constitutionality. While such a presumption may have been the reality in the era when *Muller* v. *Oregon,* 208 U.S. 412 (1912), *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), and *Hoyt* v. *Florida* 368 U.S. 57 (1961), were the leading precedents on the constitutionality of explicit gender lines, in the last decade this Court has struck down a multitude of such classifications (*e.g., Califano* v. *Westcott,* 443 U.S. 76 (1979), *Orr* v. *Orr,* 440 U.S. 268 (1979); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Califano* v. *Goldfarb,* 430 U.S. 190 (1976)). It is now clear that, in a case challenging an explicit gender line, the burden is on

the government to establish that the gender line is substantially related to an important governmental purpose. *Wengler* v. *Druggists Mutal Insurance Co.*, 446 U.S. , 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980)("The burden . . . is on those defending the discrimination to make out the claimed justification." 64 L.Ed.2d at 116).

The statutes and policies which exclude women from combat positions are facially discriminatory; that is, they prohibit all women, no matter how willing or able any individual woman might be, from combat, close combat support or combat rotation positions. Thus, applying the general propositions stated above, they create a presumption of unconstitutionality and require careful scrutiny of the government's justifications for its exclusionary policies.

Without such a review – which is not possible here because the combat issue itself is not before the court – no assumption can be made that the combat bar is constitutional. The origins of the combat bar in an earlier and different era raise the possibility that the bar is based on unacceptable stereotypes about women's proper role. One example of the kind of views that may have motivated the combat bar is found in the legislative history of 10 U.S.C. § 6015, the original prohibition against the use of women on Navy ships. That bar, enacted as part of the Women's Armed Services Integration Act of 1948, was passed at the behest of a single Congressman and not in response to any military request. That member of Congress stated his reasons as follows:

> I do not think a ship is the proper place for [women] to serve. Let them serve on shore in the continental United States and outside of the United States, but keep them off the

> ships. Of course, they ought to be on hospital ships.

Hearings Before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess. 5690 (1948). See also opinion of the District Court, Jur. St. at 22a, n.15 (describing the "aura of male chauvinism [that] permeated Congressional attitudes toward women in the military" at the time Congress passed the Women's Armed Services Integration Act). Significantly, section 6015 was successfully challenged by women Navy personnel on the ground of sex discrimination. *Owens* v. *Brown,* 455 F. Supp. 291 (D.D.C. 1978). In that case, the court outlined the numerous ways in which section 6015 hindered women's employment opportunities in the Navy. *Id.* at 294-96. The "harsh effects" included barring women from "all but a small fraction" of the Navy's ratings and career classifications, both at sea and on shore; precluding them from developing job skills and technical expertise, thus limiting both women's advancement opportunities within the Navy and their ability to compete for civilian employment upon leaving the military; imposing a quota on the number of women permitted into the Navy, thereby limiting women's access to a Navy career and to the "numerous and economically significant veterans' benefits and preferences" that flow from completion of that career; and preventing women from "taking part in an essential national enterprise to the limits of their abilities."

The court in *Owens* discussed "the entire range of Navy duties, noncombat and combat alike," and found that section 6015 was "wholly irrational as to noncombat assignments and largely rational *but not rational enough* as to the full range of naval duties." *Id.* at 308, n.65. (Emphasis added). The court granted plaintiff's motion for

summary judgment, which sought a declaration of the statute's unconstitutionality and an injunction prohibiting defendants from relying on section 6015 "when formulating policy for the training and assignment of Navy women to duty." *Id.* at 294, 310.

Both the legislative history of section 6015 and the successful legal challenge based on it suggest that when this Court finally considers the reasons for the exclusion of women from combat and combat-related positions, those reasons will not provide an adequate justification for the combat bars.

To permit the combat gender line to justify that drawn in the registration statute is to allow one *prima facie* unconstitutional classification to justify another, a result which for the reasons stated above is improper. In addition, such reasoning would open the door to the justification of a myriad of other military policies that rest on the combat restriction. For example, the government has sought to justify higher entry-level criteria for women volunteers and quotas on enlistment of women because of the combat bar. *Owens* v. *Brown, supra,* 455 F. Supp. at 294-96. The net effect of these policies is a pervasive discrimination against women in the military and the creation of disadvantages to women outside the military as well.[20] *Ballard* itself illustrates the "seamless web" effect created by the Court's willingness to uphold a military gender line because of the antecedent ban on women in combat.

Ballard does not, however, support the government's theoretical construct in this case. In *Schlesinger,* women officers were allowed a longer period of time to achieve

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[20]*See generally* Brief submitted by the National Organization for Women as *amicus curiae* in this case.

promotion than men. This distinction was upheld on the ground that women had "less opportunity for promotion" than did their male counterparts because of § 6015's ban on women at sea. Thus the discrimination was permitted because it was compensatory. 419 U.S. 498, 508. *Cf. Frontiero* v. *Richardson,* 411 U.S. 677, 689 n.22 (where Court distinguishes situation before it, in which statute at issue created disadvantages for women, from situations in which the gender-based statute was designed to remedy discrimination against women). There is no such remedial purpose to the exclusion of women from registration in this case. On the contrary, that exclusion contributes to government sponsored segregation of women in the military and second class citizenship both in the military and in society at large.

In sum, the government repeatedly ties the resolution of the registration issue to the existence of the combat bar and to the fact that the combat bar is not challenged in this case. First, it would be wholly inappropriate to uphold the male-only registration on the ground that the unexamined but facially discriminatory and presumptively unconstitutional male-only combat rules require such a result. Second, the combat bar is not challenged in this case because it is irrelevant to the determination of the issue before the Court.[21] The testimony before the Congress by the military experts supported registration of women, even while assuming that existing combat bars would remain in place. Thus, the limitation of registration to men has no basis in military need and must therefore rest on the traditional views about women that historically have undergirded the Congressional treatment of women in the military.

[21]In any event, men who have been required only to register, but have not been actually drafted, almost certainly lack standing to raise the combat issue for lack of a case or controversy.

C. The Court may terminate the male-only registration or may extend it to include registration of women

If this Court finds the male-only registration unconstitutional, it may remedy the situation in one of two ways. First, the Court may invalidate the statute altogether, leaving it to Congress to enact new registration requirements. Alternatively, the Court may repair the statute by extending it to include the registration of women. *Califano* v. *Westcott,* 443 U.S. 76, 89 (1979), quoting Justice Harlan's opinion in *Welsh* v. *United States,* 398 U.S. 333, 361 (1970).

In deciding which of these two alternatives is most appropriate – invalidation or extension – the Court must decide which of the two options is most consistent with the intent of Congress in enacting the registration requirement. As Justice Harlan noted in *Welsh,* the Court must

> measure the intensity of commitment to the residual [Congressional] policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

398 U.S. at 365. Specifically, in this situation the Court must decide whether, faced with the knowledge that a male-only registration requirement is unconstitutional, Congress would have enacted a statute which includes women or would have chosen instead to enact no statute at all.[22] It is therefore critical to examine Congress' intention in enacting the original male-only statute.

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[22]*See* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 Cleveland State L. Rev. 301 (1979); Note, Extension Versus Invalidation of Underinclusive Statutes: A

The legislative history may be read to support either invalidation or extension. On the one hand, the 96th Congress deliberately chose to exclude women from draft registration.[23] It did so despite military testimony strongly favoring female registration. This fact, coupled with the fact that the registration of women is a politically sensitive issue, suggests that the Court should invalidate the statute and leave it to Congress to enact new, constitutionally permissible legislation.

On the other hand, the legislative history is equally clear that Congress believed registration was vitally important to the national security interests of the country. If this is so, invalidating the statute would severely disrupt the statutory scheme. This suggests that the appropriate remedy would be to save the statute by extending its provisions to cover women. Extension of the statute is permissible even if it requires an increased expenditure of federal funds and an additional Congressional appropriation.[24]

Remedial Alternative, 12 Colum. J. L. & Soc. Prob. 115, 121 (Fall 1975); Brown, *et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 913 (1971).

[23]126 Cong. Rec. S6527-6549 (daily ed. June 10, 1980); 126 Cong. Rec. H2728-2747 (daily ed. April 22, 1980). S. Rep. No. 96-789, 96th Cong., 2d Sess. 2 (1980); H. Rep. No. 96-885, 96th Cong., 2d Sess. 2 (1980); S. Rep. No. 96-826, 96th Cong., 2d Sess. 156-61 (1980). *See also* S. Rep. No. 96-226, 96th Cong., 1st Sess. 8-9 (1979).

[24]*See, e.g., Califano* v. *Westcott,* 443 U.S. 76 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199 (1977); *Califano* v. *Silbowitz, 430 U.S. 924 (1977), aff'g mem.* 397 F. Supp. 862 (S.D. Fla. 1975); *Jablon* v. *Califano,* 430 U.S. 924 (1977), *aff'g mem.* 399 F. Supp. 118 (D. Md. 1975); *Weinberger* v. *Weisenfeld,* 420 U.S. 636 (1975); *United States Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Richardson* v. *Griffin,* 409 U.S. 1069, *aff'g mem* 346 F. Supp. 1226 (D. Md. 1972) (all extending federal welfare benefits); *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974); *New Jersey Welfare Rights* v. *Cahill,* 411 U.S. 619 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In sum, either extension or invalidation would eliminate the Constitutional defect in the statute. Whatever remedy the Court chooses, *amici* submit that the statute as written is unconstitutional. This Court should declare that the Constitution requires that women must shoulder the burdens and responsibilities of citizenship equally with men, as well as share in societal benefits.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the district court holding the male-only registration statute unconstitutional should be affirmed.

Respectfully submitted,

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